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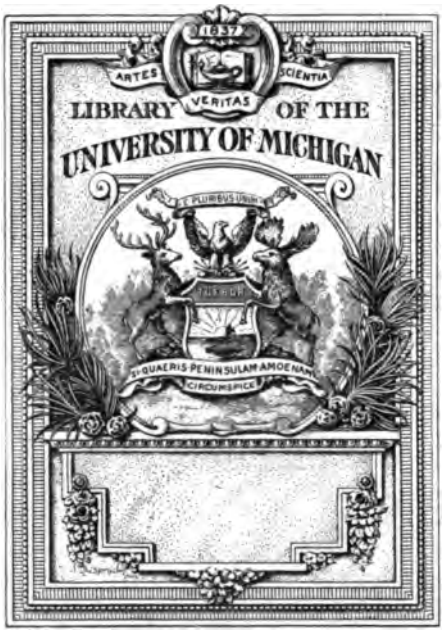

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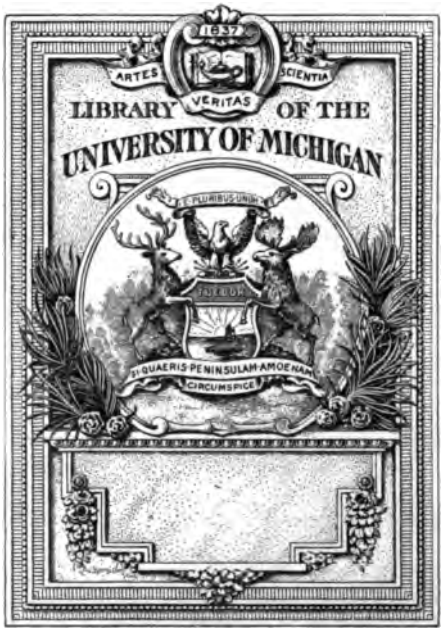

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OF

THE UNITED STATES

ADVISING THE

PRESIDENT AND HEADS OF DEPARTM

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THEIR OFFICIAL DUTIES

EDITED BY

JAMES A. FINCH

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AND

ACTING ATTORNEYS-GENERAL

HON. MILTON D. PURDY,

HON. CHARLES W. RUSSELL,

HON. ALFORD W. COOLEY.

ALSO CONTAINING CITATIONS OF ACTS OF CONGRESS, TH
STATUTES, THE CONSTITUTION, TREATIES AND CONVE
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OPINIONS

OF

HON. WILLIAM H. MOODY, OF MASSACHUSETTS.

APPOINTED JULY 1, 1904.

CONTRACT LABORERS FOR PANAMA CANAL—HOURS OF LABOR.

The Canal Commission has authority to enter into an agreement with the International Contracting Company, of Maine, whereby the latter agrees to supply male Chinamen for work upon the Panama Canal, and to feed, clothe, and transport them back to China at the expiration of their respective contracts of employment, notwithstanding said agreement contains a provision that ten hours shall constitute a day's labor.

The contract labor laws do not extend to the Canal Zone. The act of March 3, 1903 (32 Stat., 1213), extended those laws to "any water, territory, or other place *now* subject to the jurisdiction" of the United States, but the treaty with the Republic of Panama giving the United States jurisdiction of the Zone was of a later date.

DEPARTMENT OF JUSTICE,
July 12, 1906.

SIR: I have received your communication of the 8th instant, reading as follows:

"I forward to you herewith the draft of an agreement prepared by Mr. Charlton and approved by Messrs. Stevens and Shonts, and request your opinion as to whether the agreement is within the authority of the Commission and according to law."

The draft of agreement is one providing for the furnishing of a number of Chinese laborers to be brought from China and employed upon the work of the Panama Canal.

It is a proposed agreement between the Canal Commission and the International Contracting Company, organized under the laws of Maine.

By it the company will agree to supply male Chinamen, to defray the expenses of feeding and clothing them, and transport them back to China at the expiration of their respective contracts of employment; to take measures to identify each individual Chinaman; to file with the American consul and in the office of the company in the Canal Zone, where it will be open to inspection, a copy of the contract with each individual Chinaman, the form of which is to be approved by the Secretary of War before being signed, no different contract to be made; to provide foremen for gangs of the Chinese, through whom orders are to be given them, and physicians to attend them, and to deport to the original ports of embarkation in China all Chinese who shall for any cause cease working for the company, with the proviso that the Commission will furnish the company quarters in which such Chinese shall be detained until the total number shall have reached 250, or until one of the company's steamships shall be departing for China, or the company is able, in the opinion of the Commission, to arrange with any steamship line for the transportation.

The draft of agreement contains the following:

"It is agreed that ten hours, at any time during the day or night, shall constitute a day's labor, and all work in excess of ten hours in any twenty-four hour period and all work on holidays shall be considered as emergency work or overtime and paid for as such."

On the 30th ultimo Congress passed an act declaring that the act of Congress relating to "limitations of the hours of daily service of laborers and mechanics employed upon the public works of the United States" shall not apply to unskilled alien laborers and to the foremen and superintendents of such laborers employed in the construction of the Isthmian Canal within the Canal Zone.

The contract labor laws do not extend to the Canal Zone. Congress extended them on March 3, 1903, to "any waters, territory, or other place *now* subject to the jurisdiction" of the United States. The treaty with the Republic of Panama giving us jurisdiction is of a later date than March 3, 1903.

There is, accordingly, no objection to the proposed agreement arising out of the fact that the hours of the labor will be more than eight or the fact of contracting to import laborers.

Every country has a right, in the absence of a treaty provision to the contrary, to exclude and to deport aliens, and therefore, there being no such treaty provision, there is no objection to the proposed agreement on account of the bond to be given to the Republic of Panama, conditioned upon the deportation of the Chinese at the end of their service, and further conditioned not to permit any of them to enter into or remain within the Republic of Panama, except during transit; nor (in view of the President's governing authority as to the Canal Zone) on account of the agreement of the company to deport them from it at the conclusion of their service.

I have carefully examined each and every part of the proposed agreement, particularly with reference to Article XIII of the Constitution, as construed and explained in the Attorney-General's opinion of June 5, 1905 (25 Op., 474), and in my opinion it is within the "authority of the Commission and according to law."

Respectfully,

CHARLES W. RUSSELL,
Acting Attorney-General.

The SECRETARY OF WAR.

ALASKA—REMOVAL OF SEAT OF GOVERNMENT TO JUNEAU.

The provision in the act of June 22, 1906 (34 Stat., 416), appropriating $5,000 for clerk hire, rent of office and quarters at Juneau, etc., supersedes the legislation embraced in the act of June 6, 1900 (31 Stat., 321), to the extent that the Secretary of the Interior is authorized to direct the removal of the seat of government of Alaska from Sitka to Juneau.

DEPARTMENT OF JUSTICE,
July 17, 1906.

SIR: I have received your communication of the 13th instant, in which you say:

"The act of June 6, 1900, entitled 'An act making further provision for a civil government for the District of Alaska,

and for other purposes' (31 Stat., 321), provides, among other things, as follows:

"'SEC. 1. That the territory ceded to the United States by Russia by the treaty of March 30, 1867, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided. The temporary seat of government of said district is hereby established at Juneau: *Provided*, That the seat of government shall remain at Sitka until suitable grounds and buildings thereon shall be obtained by purchase or otherwise at Juneau.'

"In order to facilitate the administration of affairs of the district it appears desirable upon the appointment of the new governor of Alaska that the seat of government of the district should be transferred to Juneau at an early date as practicable.

"Accordingly, Governor Hoggatt secured the assignment by the judge of the first district of Alaska of two rooms in the United States court-house of Juneau, to be used as offices for the governor and the surveyor-general, the latter being ex officio secretary of the district. Thereafter, on March 19, 1906, the matter was brought to your attention, with the request for an expression of your views as to whether the assignment of rooms in the public buildings at Juneau as offices for the executive of the district of Alaska would constitute a sufficient compliance with the proviso of the act of Congress above referred to, to authorize the Secretary of the Interior to direct the removal of the seat of government from Sitka to Juneau; and under date of May 31, 1906, you decided the question in the negative.

"Subsequently, in the legislative, executive, and judicial act approved June 22, 1906, appropriation for the government of the district of Alaska was made in the following terms, to wit:

"'District of Alaska: For governor, five thousand dollars; three judges, at five thousand dollars each; three attorneys, at three thousand dollars each; three marshals, at four thousand dollars each; three clerks, at three thousand five hundred dollars each; in all, fifty-one thousand five hundred dollars.

"'For incidental and contingent expenses, clerk hire not to exceed two thousand dollars, rent of office and quarters in Juneau, stationery, lights, and fuel, to be expended under the direction of the governor, five thousand dollars.'"

You ask whether the last paragraph providing for certain offices at Juneau for the governor can be regarded as superseding the legislation embraced in the act of June 6, 1900, in such sense as to authorize you to direct the removal of the seat of government from Sitka to Juneau.

I find that in previous years the paragraph in the same legislative, executive, and judicial act reads as follows:

"For incidental and contingent expenses, clerk hire, stationery, lights, and fuel, to be expended under the direction of the governor, two thousand dollars."

In your last estimates for appropriation the same language last quoted was used; and the change was made in the law, it seems, by one of the committees of Congress.

The former appropriation of $2,000, as I learn from the Auditor for the State and other Departments, has been applied to expenses connected with the office of the governor, such as the hiring of a clerk for him; and there seems to be no doubt of the correctness of your assumption that the words inserted, "rent of offices and quarters in Juneau," and the additional $3,000 appropriated, were intended to provide, among other things, for an office and quarters for the government in Juneau during the fiscal year for which the appropriation law was passed.

The act expressly repeals all inconsistent laws or part of laws. Without such express provision, it would have the effect of modifying the language above quoted from the act of June 6, 1900.

While Congress contemplated in passing that act that the Government would obtain "suitable grounds and buildings thereon" by purchase or otherwise at Juneau, before the seat of government should go from Sitka, still it can not be supposed that Congress desires to have an office and quarters in Juneau for the governor during the fiscal year if he is not to reside in Juneau; or that, while the governor is to

have his offices there, the place is not to be the seat of government.

I therefore answer your question in the affirmative.

Respectfully,

CHARLES W. RUSSELL,
Acting Attorney-General.

The SECRETARY OF THE INTERIOR.

MUSTERING REGULATIONS.

The promulgation of a regulation by the Secretary of War, after the President shall have issued a proclamation calling for volunteers, requiring that there shall be established in the States and Territories rendezvous which shall be in charge of United States officers; that all volunteers desiring to enter the United States service must join for duty and be enrolled at one of these rendezvous; and that the United States officers on duty at such rendezvous shall have supervision and control of the enrollment and joining for duty of State volunteers, is neither authorized nor permitted by existing legislation.

Such a regulation would be valid only in so far as State and local authorities acquiesced in its observance. In so far as the regulations undertook to invalidate action which it is now competent for State and local authorities to take, and to exclude the States from any participation in the initial process of bringing volunteers into the service, they would be nugatory and might be disregarded.

The power of the Secretary of War, under the President, to establish rules for the government of the Army is necessarily limited, and does not extend to the repeal or contradiction of existing statutes, nor to the making of provisions of a legislative nature.

DEPARTMENT OF JUSTICE,
July 17, 1906.

SIR: By your letter of June 26 you submit a memorandum of The Military Secretary in which a general plan is proposed as a basis for the preparation of mustering regulations, rolls, returns, and other forms, so as to have them ready for immediate issue to volunteer troops whenever such troops shall be called for under the provisions of the act of Congress approved April 22, 1898, and you ask my opinion as to whether there is any legal objection to the adoption of this plan, or, more specifically, "whether under existing law it will be competent for the Secretary of War, after the President shall have issued a proclamation calling

for volunteers, to prescribe regulations requiring that there shall be established in the States and Territories rendezvous which shall be in charge of United States officers; that all volunteers desiring to enter the United States service must join for duty and be enrolled at one of these rendezvous; and that United States officers on duty at these rendezvous shall have supervision and control of the enrollment and joining for duty of the State volunteers presenting themselves there."

The purpose of the plan in question is to provide for the making and preservation of an accurate record of the date and place of enrollment and joining for duty of volunteers received into the service of the United States, where these steps have taken place prior to actual acceptance into the service. This information is rendered necessary to pay and accounting officers by the terms of the act of Congress approved July 7, 1898, which provides that the pay and allowance of all officers and enlisted men of the volunteers received into the service under the act of April 22, 1898, shall be deemed to commence, not merely from the date of their muster in, or acceptance into the service, but "from the day on which they had their names enrolled for service in the Volunteer Army of the United States and joined for duty therein after having been called for by the governor on the authority of the President."

The plan proposed to meet this situation contemplates on the one hand the assumption by the United States of full control, supervision, and management in connection with the enrollment and joining for duty of volunteers, and the performance by officers of the United States of all the necessary duties involved, and, on the other hand, the total exclusion of State authorities or other agencies from any participation in the process by denying recognition to enrollment and joining for duty conducted under such auspices. The plan in question has nothing to do with the calling forth of the militia, and requires no consideration of the respective powers of the National and State governments over forces of this character. By constitutional grant Congress is given the power to raise and support armies and the power to make rules for the government of the land and

naval forces. While these powers, when exercised in making temporary additions to the Regular Army, have apparently always been used hitherto in conjunction with the power to call forth the militia, whereby the militia idea has been preserved even in the creation of strictly volunteer organizations, they are undoubtedly broad enough to vest in Congress the right to take over the whole task of raising a volunteer army (not made up of militia forces) in all its stages, from first to last, and quite independently of State action. The question, then, is not whether Congress has power in the premises, but whether such an assumption of exclusive control as above described is actually authorized, expressly or impliedly, or is at least permitted by existing legislation.

The volunteers to whom the plan in question is intended to apply are those mentioned in the act of April 22, 1898. (30 Stat., 361.) This act, among other provisions, declares who shall constitute the national forces and be liable to perform military duty, designates the Regular Army and the Volunteer Army of the United States as the two branches of the Army in time of war, defines "the Regular Army," and enacts that the Volunteer Army shall be raised and organized "as in this act provided;" and it further provides:

"SEC. 5. That when it becomes necessary to raise a volunteer army the President shall issue his proclamation stating the number of men desired, within such limits as may be fixed by law, and the Secretary of War shall prescribe such rules and regulations, not inconsistent with the terms of this act, as may in his judgment be necessary for the purpose of examining, organizing, and receiving into service the men called for: *Provided*, That all men received into service in the Volunteer Army shall, as far as practicable, be taken from the several States and Territories and the District of Columbia and the Indian Territory in proportion to their population. And any company, troop, battalion, or regiment from the Indian Territory shall be formed and organized under such rules and regulations as shall be prescribed by the Secretary of War.

"SEC. 6. That the Volunteer Army and the militia of the States when called into the service of the United States shall

be organized under and shall be subject to the laws, orders, and regulations governing the Regular Army: *Provided*, That each regiment of the Volunteer Army shall have one surgeon, two assistant surgeons, and one chaplain, and that all the regimental and company officers shall be appointed by the governors of the States in which their respective organizations are raised. * * *"

It will be noted that the fifth section of this act authorizes the Secretary of War "to prescribe such rules and regulations, not inconsistent with the terms of this act, as may in his judgment be necessary for the purpose of examining, organizing, and receiving into the service the men called for." At first blush it might be supposed that this provision furnished ample authority to justify the Secretary of War in requiring that enrollment and joining for duty of volunteers shall take place only before officers of the United States. But can such a regulation be regarded as "not inconsistent with the terms of this act?" The same section containing this provision also provides that men received into the service shall be taken from the several States and Territories in proportion to their population and that, in the specific case of Indian Territory, any company, troop, battalion, or regiment "shall be formed and organized under such rules and regulations as shall be prescribed by the Secretary of War." This singling out of the Indian Territory from all the other States and Territories, according to a well-known rule of interpretation, implies that in the latter, companies, troops, battalions, and regiments may be formed otherwise than under rules and regulations prescribed by the Secretary of War. Neither in the clause giving the Secretary of War general authority to prescribe rules and regulations, nor in the clause giving him specific authority to regulate the raising of volunteer forces in the Indian Territory, are the phrases "enrolled for service" and "joined for duty" employed, and only the latter clause can fairly be said to comprehend these processes. The regulations referred to in the former provision are for the purpose of "examining, organizing, and receiving into the service" the men called for, and, for anything that appears to the contrary, may be intended to apply only when the

matter of enrollment and joining for duty shall have been concluded, or when this matter may have been neglected by State authorities. The latter provision, on the other hand, requires that volunteer bodies in the Indian Territory "shall be *formed* and organized under" regulations prescribed by the Secretary of War. A further provision of some significance, as tending to show that Congress must have contemplated that enrollment and joining for duty of volunteers might take place under State auspices, is that contained in the sixth section above quoted, by which it is enacted that in the case of each regiment of the Volunteer Army "all regimental and company officers shall be appointed by the governors of the States in which their respective organizations are raised." It may be conceded that this power of appointment could be exercised although the work of assembling and enrolling volunteers was performed wholly by officers of the United States; but in view of what appears to have been the general practice hitherto, it is more reasonable to regard this provision as affording a distinct sanction to the previous practice.

The subsequent legislation, supplementary in character, to meet the requirements of which the present plan was devised, fully confirms the views already expressed. During the organization of volunteer forces in the war with Spain it was found that a period of substantial duration intervened between the time of enrollment and the time of muster in, thus giving rise to an equitable claim for compensation on the part of volunteers subsequently accepted for service, which was not recognized by the original act of April 22, 1898, the pay of volunteers under this act not beginning until service had actually begun (23 Op., 409). Accordingly, by the act of May 26, 1898 (30 Stat., 420), entitled "An act providing for the payment and maintenance of volunteers *during the interval between their enrollment and muster into* the United States service, and for other purposes," it was provided that the pay and allowance of volunteers should "be deemed to commence from the day on which they joined for duty and are enrolled at the battalion, regimental, or State rendezvous. As pointed out by The Military Secretary, however, it was then discovered that "in some

instances this discriminated against those in the rural districts who joined their company organizations at an earlier date." It was therefore provided, by act of July 7, 1898 (30 Stat., 721), that the pay and allowance of volunteers should "be deemed to commence from the day on which they had their names enrolled for service in the Volunteer Army of the United States, and joined for duty therein after having been called for by the governor on the authority of the President." In view of the circumstances under which the initial steps toward raising volunteer forces had in fact been taken prior to the enactment of this legislation, in view of the sanction inferentially given to this procedure by the original act of April 22, 1898, and in view of the occasion and the purpose of the subsequent acts of May 26 and July 7, 1898, there can be no doubt as to either the interpretation or the application which these latter acts should receive. The supplementary acts in terms deal with a period or an interval prior to the acceptance of volunteers into the service of the United States and prior to the time when officers of the United States have any jurisdiction over them. It follows, therefore, that the enrollment and joining for duty which mark the beginning of this period refer to matters and details which may be legally attended to by persons entirely outside the military establishment of the United States and independent of its authority—by the persons, in other words, who have usually attended to these matters—the appropriate authorities in the several States. If enrollment and joining for duty can legally take place under State auspices, and if enrollment and joining for duty under such circumstances, by force of the statute, give rise to certain legal rights, the regulations of an executive or administrative officer can not, of course, deprive such acts of their legal quality or avoid the legal consequences which ensue upon their performance. The power of the Secretary of War, under the President, to establish rules for the government of the Army is necessarily limited, "and does not extend to the repeal or contradiction of existing statutes, nor to the making of provisions of a legislative nature" (10 Op., 10). The most that can be said, therefore, in support of regulations adopted in pursuance of

the plan in question is that they would be "not inconsistent" with the terms of the statute, and therefore valid, only in so far as State and local authorities acquiesced in their observance and abandoned to United States officers entire control of all preliminary measures involved in the raising of volunteer forces. In so far, however, as such regulations undertook to invalidate actions which, as has been seen, State and local authorities are competent to take, and to exclude the States from any participation in the initial process of bringing volunteers into the service, contrary to the clear intention of Congress, they would be simply nugatory and might be wholly disregarded.

For the reasons given, therefore, I am of opinion that the proposed plan is neither authorized nor permitted by existing legislation.

Respectfully,

HENRY M. HOYT,
Acting Attorney-General.

The SECRETARY OF WAR.

NAVAL HOSPITAL, YOKOHAMA—TITLE TO LAND.

The money appropriated by the act of June 29, 1906 (34 Stat., 568), for the purchase for the naval hospital at Yokohama, Japan, of land adjoining its grounds, may properly be expended for the purchase of a lease in perpetuity to said land subject to an annual rental to the Japanese Government, that being the tenure by which the land is now held and the only title that can be obtained, and the Imperial Government having indicated that it has no objection to the transfer for the purpose named.

The purchase of the leasehold with the consent of the Japanese Government would, for all practical purposes, be equivalent to a purchase of the land itself.

Laws should be given a reasonable construction and application to further the object of the lawmaker.

The word "State," as used in section 355, Revised Statutes, regarding the acquisition of land for the erection thereon of any armory, arsenal, etc., or any other public building of any kind whatsoever, signifies a State of the Union.

DEPARTMENT OF JUSTICE,
July 18, 1906.

SIR: I have received, with its inclosures, your communication of the 12th instant, reading as follows:

"The act making appropriations for the naval service,

approved June 29, 1906, under the heading 'Public Works, Bureau of Medicine and Surgery' [34 Stat., 568], contains the following clause:

"'Naval hospital, Yokohama, Japan: For purchase of land adjoining present hospital grounds, five thousand dollars.'

"The Department has available for the improvement of the Yokohama hospital the sum of $25,000, heretofore appropriated (act of March 3, 1903, 32 Stat., 1190). Our minister to Japan, Mr. Lloyd C. Griscom, November 25, 1905, reports that the tract of land desired to be purchased for the use of the naval hospital at Yokohama is held by lease, in perpetuity, by R. Lindan, a German subject, and that, should the lease be transferred to the United States Government by him, the Imperial Japanese Government would have no objection to the employment of the land to improve the facilities of the naval hospital. It appears, however, that, in response to an inquiry on the subject made by Mr. Griscom, Baron Komura, the minister for foreign affairs of Japan, makes this statement:

"'It is, however, to be added that such transfer will be of the same value as transfer of property between private individuals, and hence it will not produce any privileges or immunities other than those attached to such leases in general.'

"With respect to the description and present status of the property, Mr. Griscom further reports:

"'Mr. Lindan, who holds the property, is absent from Japan, but his agents, Messrs. Ahrens & Co., state that bluff lot No. 98 can be purchased for yen 6,000, that the lot is said to measure 440 tsubos (1 tsubo equals 36 square feet), and that the annual ground rent payable to the Japanese Government is at the rate of $12 Mexican for 100 tsubos.'

"Being impressed with the importance of enlarging the facilities of the naval hospital at Yokohama without unnecessary delay, have the honor to request your advice upon the following points:

"1. Whether, in view of the assent of the Imperial Japanese Government, as expressed in Baron Komura's letter of November 21, 1903, section 355 of the Revised Statutes, respecting cession of jurisdiction, has any application to this

case; and whether any further cession of sovereignty or national jurisdiction is necessary in order that this Department may carry out the purpose of Congress in making the appropriations above mentioned.

"2. Whether payment in the form mentioned by Mr. Griscom of 'annual ground rent * * * to the Japanese Government' constitutes a payment of taxes or is an obstacle to the conclusion of the transaction."

Referring to your first question, section 355 of the Revised Statutes forbids the expenditure of money upon any site or land purchased by the United States for the purpose of erecting thereon any armory, arsenal, etc., or any other public building of any kind whatever, until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. The section says nothing about a cession of jurisdiction. But it is clear that the section was drafted with a view to the language of section 8, Article 1, of the Constitution giving Congress power "to exercise exclusive legislation in all cases whatsoever * * * all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

It can not be supposed that the makers of the Constitution would undertake, by their mere fiat, to confer upon Congress exclusive legislative power over a portion of a foreign country, nor is it probable that they were contemplating the erection of permanent forts and arsenals in foreign countries. Accordingly, the word State, in section 355, Revised Statutes, signifies, as it often does, a State of the Union.

As to the necessity for a "further cession of jurisdiction," I do not find in prior laws appropriating for the establishment or improvement of the naval hospital any condition imposed by Congress concerning the acquisition or exercise of sovereignty or national jurisdiction, and there is nothing in the language of the appropriation now under consideration to indicate that that appropriation is so conditioned. We formerly exercised exterritoriality in Japan, but the treaty abolishing that did not reserve or confer jurisdiction over the naval hospital; if it had, yet it would not follow that this last appropriation was conditioned upon the

acquisition of like jurisdiction over the strip of land now in question.

As to the annual ground rent, it seems that the land is held under the Japanese Government, subject to the payment of about $50 per year to the treasury. It is treated as purchasable by one individual from another.

Congress made the last appropriation of $5,000 for the purchase of "land adjoining present hospital grounds," and undoubtedly had in view the particular land in question.

Referring to the correspondence you inclosed, dated in 1903, and including the letter from Baron Komura, I think it may be assumed that Congress had some information concerning even the title of the property.

It is presumed to understand the subject upon which it legislates and was evidently legislating here concerning a particular contemplated purchase of a particular tract of land held under perpetual lease. In the case of ordinary American ground rents there is an individual ownership distinct from the leasehold; but here there is merely a tie between the individual leaseholder and the Government. Accordingly, for all practical purposes, a purchase of the leasehold with that Government's consent would be equivalent to a purchase of the land itself. The original purchase of 1867–1871 was of land held under ground rent in just the same way.

I find that the hospital was built upon "bluff land No. 99," containing 1,715 tsubos; that the ground rent thereof amounted to $205.80, and that on July 15, 1872, Rear-Admiral Jenkins wrote the Secretary of the Navy as follows:

"Herewith is transmitted for the files of the Department a copy of the title deed given by the Japanese Government to the United States of lot No. 99 at Yokohama, Japan, upon which the naval hospital is built.

"This deed was returned by Rear-Admiral Rodgers to our minister, Mr. Long, with the request that he would endeavor to have the conditions of the lease, so far as they related to penalties imposed in case of neglect to fulfill the prescribed terms, modified, it being thought that those penalties were unusual and too severe.

"It was ascertained, however, that in all leases of lots at

Yokohama the conditions are the same, and the minister was not able to obtain any modification of them in this case."

In my opinion the laws should be given a reasonable construction and application to further the object of the lawmaker, and I think it would be unreasonable to hold the purchase in question, specifically appropriated for long after all the correspondence above referred to, illegal upon any theory suggested in your letter.

I observe that the price asked is 6,000 yen. I am informed by the Mint Bureau of the Treasury Department that a yen is worth $49\frac{8}{10}$ cents, consequently 6,000 yen are well within the appropriation of $5,000.

Respectfully,

CHARLES W. RUSSELL,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

OFFICERS OF THE MARINE CORPS AND OF THE NAVY—RELATIVE RANK.

Section 1466, Revised Statutes, fixes the relative rank of officers of the Army and of the Navy.

The expression "lineal rank being considered," in that section, means simply that it is not necessary to specify and fix relative staff rank, since staff officers in both services possess assimilated lineal rank.

There is no statutory provision expressly regulating the relative rank and precedence of officers of the Marine Corps and officers of the several staff corps of the Navy, but there are provisions which, with the long-established and settled usage and practice of the Army and Navy, regulate it with the same certainty as if by enactment in terms.

Whatever will be the relative rank of an officer of the Army to either line or staff officers of the Navy, that would also be the relative rank as to them as officers of the Marine Corps.

The opinion of October 7, 1905 (25 Op., 517), with the additional holding that sections 1466 and 1603, Revised Statutes, apply also to officers of the staff corps of the Navy, furnishes a complete guide to the provisions of law which regulate the relative rank and precedence of officers of the Marine Corps and of the several staff corps of the Navy.

The Navy Department would not have the authority (with the approval of the President) to amend the Navy Regulations so as to do away with the practice as to the relative rank of officers of the Marine Corps and line officers of the Navy, established in accordance with the opinion of the Attorney-General of October 7, 1905 (25 Op., 517).

The relation as to rank which officers of the Marine Corps hold to other officers is prescribed by section 1603, Revised Statutes, and could not be changed by any act of the President or of the Navy Department.

DEPARTMENT OF JUSTICE,
July 20, 1906.

SIR: I have the honor to respond to your note of July 13, 1906, in which you request an answer to the following questions:

"1. What provision of law regulates the relative rank and precedence of officers of the Marine Corps and officers of the several staff corps of the Navy?"

"2. Are the provisions of section 1466 of the U. S. Revised Statutes applicable to line officers of the Navy only, or do they determine the relative rank and precedence of staff officers of the Navy toward officers of the Army also?"

"3. Would the Department have authority to amend (with the approval of the President) the Naval Regulations, as suggested in the memorandum of the Bureau of Navigation, inclosed with the papers herewith submitted, the effect of such proposed amendment being to do away with the practice as to the relative rank of officers of the Marine Corps and the line officers of the Navy, established in accordance with your letter of October 7, 1905?"

Answering first your second question: Section 1466, Revised Statutes, fixes the relative rank of officers of the Army and officers of the Navy. Thus, vice-admirals rank with lieutenant-generals, commodores with brigadier-generals, captains with colonels, and so on through the list.

This section is general, with no exception or limitation, and therefore it applies equally to all officers of the Navy of the grades there mentioned, whether of the line or staff. That section contains the clause "lineal rank only being considered," but that simply means that it is not necessary to specify and fix relative staff rank, since staff officers in both services possess assimilated lineal rank.

Your first question asks, "What provision of law regulates the relative rank and precedence of officers of the Marine Corps and officers of the several staff corps of the Navy?" There is no statutory provision expressly regulating this, but there are such provisions which, with the long estab-

lished and settled usage and practice of the Army and Navy, regulate it with the same certainty as if by enactment in terms.

A similar question as to the relative rank and precedence of officers of the Marine Corps and officers of the line in the Navy was carefully considered in an opinion to your Department on October 7, 1905. That opinion fully answers your present question, if it is applicable to officers of the staff corps also, as well as to officers of the line of the Navy.

Section 1605, Revised Statutes, provides that—

"The officers of the Marine Corps shall be, in relation to rank, on the same footing as officers of similar grades in the Army."

Here, too, the section is general in its terms, with no exception or limitation as to application. It does not restrict this similarity of rank to officers of the Army, but provides that "officers of the Marine Corps shall be, in relation to rank, on the same footing as officers of similar grades in the Army." That is to say, whatever relation as to rank one army officer may hold as to another officer, that is the relation which an officer of the Marine Corps of similar grade holds. And as to rank and its resulting precedence, the relation of an officer of the Marine Corps to an officer in the Navy, line or staff, is precisely that which an army officer of similar grade would hold to such naval officer. In no other way can these officers be on the same footing, as to rank, as this section requires. This is as applicable to officers of the staff corps of the Navy as to officers of the line.

In determining this relative rank of officers in similar grades, Congress has, as a rule, adopted the criterion of seniority of commission, though in a few instances length of service is made to govern. The latter is the case with reference to staff officers in their several corps and grades, and in relation to officers of the line of the Navy, with whom they hold relative rank, as provided in sections 1485–1486, Revised Statutes. That is to say, in the Army the test of rank in any grade is date of commission, and the period of

actual service as an officer of the United States is not taken into account except in cases where the date of appointment and of commission is the same (sec. 1219, R. S.; see also arts. 9, 10, Army Regulations, 1904). The Navy rule is similar (sec. 1467, R. S.): "Line officers shall take rank in each grade according to the dates of their commissions." That is the general rule, and it is the established rule as between the two services, because line title and rank alone are considered in fixing relative rank between officers of the Army and of the Navy. In other words, the necessary inference from these various provisions of law, and immemorial usage and comity between the Army and Navy, is that the line rule of date of commission applies. This is all entirely consistent with the special rule in the Navy and within any particular grade that, as between line and staff officers in that grade, length of service shall determine the precedence (secs. 1485, 1486, *ut sup.*).

However this may be, it is certain that under any criterion, whatever will be the relative rank of an officer of the Army to either line or staff officers of the Navy, that would also be the relative rank as to them of an officer of the Marine Corps.

With the addition of the above holding that sections 1466 and 1603 apply also to officers of the staff corps of the Navy, my former opinion of October 7, 1905, furnishes a full answer to your first question, as the same legal provisions and settled practice of the Army and Navy there referred to as regulating the rank and precedence of officers of the Marine Corps and officers of the line of the Navy regulate the rank and precedence of such marine officers with officers of the staff corps of the Navy.

Replying to your third question, I would say that whatever rules or regulations, or amendments thereof, the President or the Secretary may make for the government of the Navy, they must be always with the limitation that they are not inconsistent with existing law.

The relation as to rank which officers of the Marine Corps hold as to other officers is prescribed by act of Congress, viz, section 1603, Revised Statutes, and could not be changed

by any act of the President or of your Department. This question is answered in the negative.

Respectfully,

HENRY M. HOYT,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

FEDERAL BUILDING AT SARATOGA SPRINGS, N. Y.—APPROPRIATIONS.

Various acts of Congress appropriating money for the purchase of a site and the erection thereon of a Federal building at Saratoga Springs, N. Y., considered, and *held*, that the act of June 30, 1906 (34 Stat., 773), which increased the cost theretofore fixed by Congress by $35,000, and authorized the Secretary of the Treasury to enter into contracts for the completion of the building within the limit of cost, including site, authorizes that officer to acquire the site and erect the building at a total cost of $125,000. The intent of that act was to ignore the previous division between the cost of the site and the cost of the building and substitute a lump-sum limit or measure for both building and site.

The Secretary is therefore not limited as to the cost of the site, but a sufficient amount of the appropriation should be reserved to properly erect the building.

DEPARTMENT OF JUSTICE,
August 2, 1906.

SIR: I have received your communication dated July 27, 1906, requesting an opinion, as follows:

"Certain legislation has been enacted from time to time during a period of four years with respect to the acquisition of a site and the erection thereon of a Federal building at Saratoga Springs, N. Y., under which the Department has endeavored to act, and desires further to act, within the limit of its authority, and I have the honor to invite your attention to such legislation and request to be advised as to its effect: Section 5 of the omnibus public building bill, approved June 6, 1902 (32 Stat., 310), provides, in part, as follows:

"'That the Secretary of the Treasury be, and he is hereby, authorized and directed to acquire, by purchase, condemnation, or otherwise, a suitable site for a United States postoffice and other governmental offices in each of the cities

enumerated in this section, within its respective limit of cost hereby fixed: * * * Saratoga Springs, New York, fifteen thousand dollars.'

"It is provided in the same section that, upon the failure of the Secretary of the Treasury to acquire a suitable site in any city mentioned in said act within the limit of cost herein set forth, and within two years after the passage of said act, then so much of the act as applies to the city or cities where such failure occurs shall be null and void. The Department was unable to secure a suitable site at Saratoga Springs, N. Y., within the limit of cost fixed therefor, and the following legislation was enacted in the omnibus public building bill approved March 3, 1903, and will be found under section 3 (32 Stat., 1207):

"'That to enable the Secretary of the Treasury to give effect to and execute the provisions of existing legislation authorizing the purchase of sites in the several cities hereinafter enumerated, the limit of cost heretofore fixed by Congress therefor be, and the same is hereby, increased, respectively, as follows: * * * United States post-office at Saratoga Springs, New York, from fifteen thousand dollars to twenty thousand dollars: *Provided*, That the Secretary of the Treasury is hereby authorized, in his discretion, to contract for the erection and completion of a suitable building, including fireproof vaults, heating and ventilating apparatus and approaches, complete, for the use and accommodation of the United States post-office and other governmental offices, upon a site secured, or to be secured, within the limit of cost herein provided at Albert Lea, Minnesota, and Saratoga Springs, New York, the limit of cost of building at Albert Lea, Minnesota, to be thirty thousand dollars, and the limit of cost of building at Saratoga Springs, New York, to be seventy thousand dollars.'

"It will be observed that the limit of cost of site and building at Saratoga Springs, N. Y., is separately and specifically fixed in the paragraph just quoted.

"A further effort was made under the provisions of the legislation last quoted to secure a Federal building site at Saratoga Springs, N. Y., within the limit of $20,000 fixed therefor, but without success.

"In the meantime the following legislation was enacted and will be found in the sundry civil act approved April 28, 1904 (33 Stat., 457):

"'Zanesville, Ohio, post-office: For continuation of building under present limit, twenty-five thousand dollars: *Provided*, That the limitation of two years fixed in the proviso to section five of the act to increase the limit of cost of certain public buildings, to authorize the purchase of sites for public buildings, to authorize the erection and completion of public buildings, and for other purposes, approved June 6, 1902, in which to acquire a suitable site in any city mentioned in said act, is hereby extended for one year, to June 6, 1905.'

"No site for a public building at Saratoga Springs has yet been acquired by the Government because the limit of cost fixed therefor was insufficient for the purpose. Upon these conditions becoming known to the Committee on Public Buildings and Grounds there was included in section 1 of the omnibus public building bill, approved June 30, 1906 (34 Stat., 773), the following item:

"'That to enable the Secretary of the Treasury of the United States to give effect to and execute the provisions of existing legislation authorizing the purchase of sites and the erection thereon of public buildings in the several cities hereinafter enumerated, the limit of cost heretofore fixed by Congress therefor be and the same is hereby increased, respectively, as follows, and the Secretary of the Treasury is hereby authorized to enter into contracts for the completion of each of said buildings within its respective limit of cost, including site * * * United States post-office at Saratoga Springs, New York, thirty-five thousand dollars.'

"The fact that Congress has enacted additional legislation since the expiration of the time limited for the acquisition of sites mentioned in the act of June 6, 1902, above referred to, would seem to this Department to indicate that the legislative intent was to give the Secretary of the Treasury authority to acquire a site and construct a public building at Saratoga Springs, N. Y., and thereby to repeal pro tanto the limitation contained in the proviso in section 5 of the act of June 6, 1902, relating to the time within

which sites were to be acquired in all cities mentioned in said act, and to revive the previous authorization respecting the acquisition of a site and the erection thereon of a public building at Saratoga Springs, N. Y.

"The Department is not certain whether the effect of the legislation above referred to is to fix the limit of cost for site and building at Saratoga Springs, N. Y., at $105,000 or $125,000, and therefore has the honor to request an expression of your opinion upon this feature and upon the further feature as to whether the effect of said legislation is such that in acquiring a site at Saratoga Springs, the Department is limited to any particular amount so long as the balance of the limit of cost remaining for the purchase of a site will be sufficient to enable the Department to construct on the site a suitable building of the character contemplated by said legislation."

In addition to the statutes quoted in your letter there are four appropriations, one dated April 28, 1904, reading: "Saratoga Springs Post-Office, N. Y. For commencement of building under present limit, $20,000;" another dated March 3, 1905, reading: "Saratoga Springs Post-Office, N. Y. For continuation of building, $20,000." The total appropriations are $60,000.

There is no other legislation, and has been no other, so far as I am advised, concerning the site or building at Saratoga Springs, N. Y.

When, therefore, Congress in the act of June 30, 1906, speaks of "enabling the Secretary of the Treasury to give effect to and execute the provisions of existing legislation authorizing the purchase of sites and erections of buildings," the legislature must have had in mind all or some of that above quoted, so far as the post-office at Saratoga Springs is concerned.

And it doubtless did have in mind only the provisions of the act of 1902, expressly authorizing the purchase of the site for $15,000, or the act of March 3, 1903, increasing the cost of the site to $20,000 and expressly authorizing the erection of the building at a cost stated, or both of these acts, because it is only these that purport to be "legislation authorizing the purchase," etc.

The former had become null and void as to Saratoga Springs, owing to the failure to purchase the site within the time limit of three years. The latter was "existing legislation," unless it became null and void, because altogether dependent for life upon the former—that is to say, unless the failure to procure a site within the time limit ended all authority to procure a site. Of course no building was intended to be, or could be, erected without first providing a site.

In view of the fact that the time limit was still running when the act of 1903 was passed it is at least doubtful whether that law was still, in 1906, existing and effective legislation.

And an intention to revive "legislation authorizing the purchase," etc., can not well be recognized in the act of 1906, since Congress could not have meant to revive what it regarded as already existing.

If this was a mistake, the legislature's mistaken assumption as to the law does not, as a general proposition, revive or alter the law. In *Town of Ottawa* v. *Perkins*, 94 U. S., 260, the Supreme Court says:

"But it is urged that the reference to the act of 1857 is such a recognition of that act as to give it validity, if it had none before. This was certainly not the purpose of the act of 1869, nor do we think that such was its effect. The legislature could not thus, in 1869, give validity to a void act as an act passed in 1857, which was not constitutionally passed in that year, for that would be an evasion of the Constitution. It could at most give it vitality as a new act from the date of the act of 1869. But this it does not profess to do; it only adopts its provisions for the purpose of the act then passed. And if the legislature of 1869 could have validated all proceedings had under the supposed act of 1857, it did not do so. It did not profess to do it. No such purpose is indicated in it. The most that can be said is that, in referring to the act of 1857, the legislature inadvertently supposed that it had been regularly passed. Whether such inadvertence was the result of a false suggestion by interested parties, or otherwise, is of no consequence. No intent to validate and establish the act of 1857, as a law, can

be gathered from the terms of the act of March 27, 1869. To give such a reference in a subsequent act, as is here relied on, the effect of validating or reviving or vitalizing a void or repealed statute, when no such intention is expressed, would be dangerous and would lay the foundation for evil practices. The legislature might in this way be entrapped into the enactment or reenactment of laws when it had no intention, or even suspicion, that it was doing so."

But it seems to me that, even supposing neither the act of 1902 nor that of 1903 in force, and that Congress was therefore mistaken in assuming that there was any "existing legislation" authorizing the purchase of a site and erection of a building, it does not follow that no such authority exists.

The legislation we are considering involves no vested or private rights. It is merely directory to officers of the Government. It deals with the Government's own funds, and is designed to create public buildings of an ordinary and necessary kind. It can not be supposed that the unprecedented time limit referred to, whatever its object, signified that no such building was at an early time to be erected at Saratoga Springs, or was such an important matter that Congress would not lightly disregard it in future legislation.

These things being so, let us see whether Congress has not sufficiently legislated in 1906 to authorize the purchase of this site and erection of this building at a specified limit of cost. The language is:

"That to enable the Secretary of the Treasury of the United States to give effect to and execute the provisions of existing legislation authorizing the purchase of sites and erection thereon of public buildings in the several cities hereinafter enumerated, *the limit of cost heretofore fixed by Congress therefor be*, and the same is hereby, *increased*, respectively, as follows and the Secretary of the Treasury is *hereby authorized* to enter into contracts for the completion *of each building within its respective limit of cost*, including *site*. * * * United States post-office at Saratoga Springs, New York, thirty-five thousand dollars."

First, is there anything uncertain as to the cost limit?

In nearly all the other items in the law, providing for

increases at other cities, the amount stated is a quantity to be added to a lump sum for site and building, or, as above expressed, for "the building including site."

I think this is a sufficient indication that the $35,000 is to be added to the prior cost limit of both site and building. It is "the limit of cost heretofore fixed by Congress *therefor*" (for purchase of site and erection of building) that is "hereby increased * * * $35,000."

But it may be said, if the act of 1903 is not operative and the act of 1902 is absolutely null and void there is nothing to increase by $35,000. To think this is to ignore the nature of what is to be increased. It is not a sum appropriated. It is a measure; and as though Congress had said the height of the building as heretofore fixed should be increased 20 feet. As there is no other "limit of cost therefor" that Congress could have intended to increase than the limit stated in the act of 1903, to say that that limit is increased by $35,000 gives us a definite limit, fixed by the act of 1906, whether the act of 1903 is operative or not. Congress could have said the limit shall be ascertained by adding $35,000 to a limit stated in a certain newspaper instead of referring to a prior law.

The limit of cost being definitely given by the act of 1906 and in no way dependent upon the vitality of other legislation, can we say that that act also authorizes in the same independent way the purchase of the site and erection of the building?

The language following the fixing of the limit of cost for sites and buildings in the various cities is, "and the Secretary of the Treasury is *hereby authorized* to enter into contracts for the completion of each of said buildings within its respective limit of cost, including site."

To unqualifiedly authorize the completion of a building the site of which has not yet been purchased and say what the limit of cost for site and building shall be, is impliedly to authorize the purchase of the site, since the building can not be completed until the site is first purchased.

It may be said the completion of the building is not unqualifiedly authorized, since there is a reference to existing

legislation as having already authorized it, and this last authorization would not have been made if the failure of the former one had been known.

In the nature of things as already suggested, there is no reason to believe that Congress would, in 1906, refuse to carry out the project it started in 1902 and approved by six or seven pieces of legislation, including appropriation laws, because the site was not purchased prior to a certain date in 1905. But, more important than these considerations, is this: Congress can not be presumed, in the face of its positive recital, to know that there was *no* existing legislation authorizing the purchase, etc., but it can and is to be presumed to know what time limit the act of 1902 provided, and is further to be presumed to know such things concerning the object it is legislating about as that the site had not been purchased within that limit. Nevertheless, it authorized the completion of the building and fixed the limit of cost for site and building.

But we need not rely upon the presumption that it knew the site had not been purchased when it passed the law of 1906, since we have evidence that this fact was brought to the attention of the proper committee; and we need not ignore the prevailing and unavoidable method of legislating about matters of business detail largely by committee rather than by the full Congress. On February 2, 1906, the Secretary of the Treasury, upon request, made a report addressed to the chairman of the Committee on Public Buildings and Grounds of the House of Representatives, upon H. R. 3040, introduced December 5, 1905, providing a lump sum of $150,000 for the purchase of the site and erection of the building at Saratoga Springs, N. Y., and said:

"From computation made in this Department it appears that a one-story building of 6,000 square feet ground area, with basement and attic, is sufficient, and that a fireproof building of the dimensions indicated, including fireproof vaults, heating and ventilating apparatus, and approaches, complete, will cost $90,000. It is estimated that a suitable site can be secured for $35,000."

It may be remarked in passing that $90,000 is $20,000 plus $70,000, the limits of cost given in the act of 1903 for the site and building.

Congress having, in 1906, knowing that the time limit of the act of 1902 had expired, and that no site had been purchased within the limit, used language of present authorization, express as to the completion of the building and implying authorization as to the site, and having at the same time fixed definitely the limit of cost for site and building, it seems to me we should treat that language as sufficient, without aid from the supposed "existing legislation."

In *Postmaster-General* v. *Early* (12 Wheat., 146), the Supreme Court says:

"The jurisdiction of the district courts then over suits brought by the Postmaster-General for debts and balances due the general post-office is unquestionable. Has the circuit court jurisdiction? The language of the act is that the district court shall have cognizance, concurrent with the courts and magistrates of the several States and the circuit courts of the United States, of all suits, etc. What is the meaning and purport of the words "concurrent with" the circuit courts of the United States? Are they entirely senseless? Are they to be excluded from the clause in which the legislature has inserted them, or are they to be taken into view, and allowed the effect of which they are capable? The words are certainly not senseless. They have a plain and obvious meaning. And it is, we think, a rule that words which have a meaning are not to be entirely disregarded in construing a statute. We can not understand this clause as if these words were excluded from it. They, perhaps, manifest the opinion of the legislature that the jurisdiction was in the circuit courts; but ought, we think, to be construed to give it, if it did not previously exist.

* * * * *

"The phrase may imply that power was previously given to the other, but if, in fact, it had not been given, the words are capable of imparting it. If they are susceptible of this construction, they ought to receive it, *because they will otherwise be totally inoperative*, or will contradict the

other parts of the sentence, which shows plainly the intention, that the district court shall have cognizance of the subject, and shall take it to the same extent with the circuit courts.

"It has been said, and perhaps truly, that this section was not framed with the intention of vesting jurisdiction in the circuit courts. The title of the act, and the language of the sentence, are supposed to concur in sustaining this proposition. The title speaks only of State and district courts. But it is well settled that the title can not restrain the enacting clause. It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts rather than an intention to give it, and a mistaken opinion of the legislature concerning the law does not make law. But if this mistake be manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction. We think, therefore, that in a case plainly within the judicial power of the Federal courts as prescribed in the Constitution, and plainly within the general policy of the legislature, the words ought to receive this construction."

I am of opinion that you are authorized by the act of 1906 to acquire the site and erect the building, at a total cost of $125,000. You also desire to know whether you are limited to any particular amount in purchasing the site, provided you leave enough to properly erect the building.

You undoubtedly have in mind the division made in the act of 1903 between site and building—$20,000 for site and $70,000 for building.

The three amounts are to be added together to make a limit of cost "therefor"—for site and building. The act of 1906 alone, or in conjunction with the prior legislation, whether in force or not, furnishes no rule by which the $35,000 part of the measure should be divided between the site and building. For this reason, and in view of the language concerning the limit of cost of site *and* building and

concerning "the building, including site," in view also of the fact that this language contemplated the usual case, of which many instances follow, of a limit for both together, I think the intent was to ignore the previous division and substitute a lump sum limit or measure for both site and building.

In my opinion, therefore, you are not limited as to the cost of the site, except, as you suggest, that enough should be reserved to properly erect the building.

Respectfully,

CHARLES W. RUSSELL,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

EIGHT-HOUR LAW—CONSTRUCTION OF NAVAL VESSELS UNDER CONTRACT.

The act of August 1, 1892 (27 Stat., 340), limiting the hours of service of laborers and mechanics employed on the public works of the United States, does not apply to vessels under construction for the Navy by contract with builders at private establishments.

Materials for such vessels, such as armor, guns, and other articles obtained under special contracts, are *a fortiori*, not within the statute.

Suggested, however, that the words "public works" can not be restricted to the conception of fixed things, such as land and structures thereon. The expression is used in river and harbor acts which provide for repairs to breakwaters and for improving rivers according to projects submitted, including, probably, dredging and deepening of channels, the interest of the United States therein being akin in permanence and completeness to title to real estate and ownership of fixed structures.

Suggested, also, that there is a difference between "public work" and "public works," the former being the broader term and including the progress or activity, and the latter the product or completed thing.

Opinion of August 24, 1892 (20 Op., 454), approved and affirmed.

DEPARTMENT OF JUSTICE,
August 3, 1906.

SIR: Your letter of July 23 submits the question whether the act of August 1, 1892, entitled "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United

States and of the District of Columbia" (27 Stat., 340), applies to labor under contract for the construction of naval vessels. The act provides:

"That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or sub-contractor upon any of the public works of the United States or of the said District of Columbia is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct or control the services of such laborers or mechanics, to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of an extraordinary emergency."

Section 2 of the act provides a penalty for violation by an officer or contractor, and section 3 excepts from the operation of the act contracts entered into prior to its passage.

The question therefore is, in effect, whether the phrase "public works of the United States," as used in the act of August 1, 1892, comprehends vessels under construction for the Navy by contract with builders at private establishments over which the Government has no executive control or supervision. It seems that various vessels are under construction in accordance with the requirements of the act of August 3, 1886 (24 Stat., 215), and as authorized by different annual appropriation acts under the heading "Increase of the Navy;" and contracts in the usual form, postponing acceptance of the vessel and complete title in the Government until final delivery, have accordingly been made for the construction of a number of such vessels in private establishments of shipbuilders.

It was held by Attorney-General Miller (20 Op., 454) that the act of 1892 does not apply to the case of a contract for furnishing certain materials to the Government for use in the construction and equipment of public buildings. In another opinion (id., 463) Mr. Miller considers the case of laborers and mechanics employed by the Quartermaster's

Department of the Army upon public works, and also of all other laborers and mechanics employed in the Quartermaster's Department performing the usual and ordinary service of the character. He held that the law applies generally and without limitation to "public works" as to laborers and mechanics in the direct employment of the Government and of the District of Columbia, and that the limitation as to *public works* applies only to such persons as are in the employ of contractors and sub-contractors. That case, however, did not at all involve employment under contractors or sub-contractors.

Mr. Griggs, construing the act of August 13, 1894 (28 Stat., 278), "for the protection of persons furnishing material and labor for the construction of public works," held that that act does not refer to contracts for the construction of naval vessels. He said (23 Op., 175):

"The object of the act was to afford a better method for enforcing against the contractor the claims of laborers and material men who had done work or furnished material upon property actually belonging to the United States, such as public buildings which could only be created upon land to which the United States had acquired a complete title—fortifications, river and harbor improvements, and such other things as are commonly understood under the designation of "public works." * * * The statute of 1894 intended, in a measure, to remedy the defect in the means of collection at the disposal of laborers and material men against contractors upon such works. No such reason applies to cases of the construction of a specific article not attached to soil the title of which is in the United States, but which is a mere movable article the whole title to which remains in the contractor until its completion and acceptance by the Government."

A similar construction has recently been given to the act of 1894 by the Supreme Court of New York in the case of Bell *v.* Empire State Surety Company, not yet reported, where the court, citing Mr. Griggs' opinion, says:

"The materials furnished by the plaintiffs under their sub-contract do not come within the purview of the act in question. Neither the plaintiffs nor the company were

engaged in the construction of any public building or the prosecution or completion of any public work within the meaning of the law. The plaintiffs were furnishing materials to a private corporation, to be used in the construction of boats which afterwards might, or might not, become the property of the United States Government. * * * The object of the act is fully subserved by construing it to relate to the construction of public buildings and the prosecution and completion of public works, in the sense that they belong to and are the property of the public, and to repairs thereof."

Undoubtedly "public works" is a phrase of rather wide signification, and it has not been precisely and fully defined. As shown, Mr. Miller and Mr. Griggs applied it to public buildings, and Mr. Griggs to river and harbor improvements. (Cf. *United States* v. *Jefferson*, 60 Fed. Rep., 736.)

In 20 Op., 445, a timber dry dock was characterized as "a valuable and permanent improvement of real estate belonging to the United States," and it was held that, being solely for the use and benefit of the United States, it was "to be regarded as one of the 'public works of the United States' under this eight-hour law."

"The term 'public works' is defined as all fixed works contracted for public use, as railways, docks, canals, waterworks, roads, etc. [citing Century Dictionary]." (*Ellis* v. *Grand Rapids*, 82 N. W., 244; 123 Mich., 567.)

(See also *Winters* v. *Duluth*, 82 Minn., 127.)

The titles of statutes and sub-headings thereof are not controlling, but they are often significant and persuasive. Besides other instances which might be given in this matter, consider the naval appropriation act of 1905 (act March 3, 1905, 33 Stat., 1092, 1101, 1104, 1105, 1116), where there are various specific appropriations for "public works" under the Secretary, under the different bureaus, and under the Marine Corps, while new construction of vessels by contract or in navy-yards is authorized under the heading "Increase of the Navy." The act immediately following is the river and harbor act of that year (33 Stat., 1117), and is technically entitled "An act making appropriations for the construction, repair, and preservation of certain *public works* on rivers and harbors, and for other purposes."

By this it is suggested that the term "public works" can not be restricted to the conception of a fixed thing, land and structures thereon, for river and harbor acts not only provide for "repairs to breakwater," for example, but also "for improving said river in accordance with the project submitted, etc., which might include dredging alone, substantially, and the mere deepening of a channel. In such a case the paramount control by the United States over the marine belt, harbor areas, and navigable waters is akin, in the interest created and in its permanence and completeness, to a title to real estate and ownership of fixed structures. But it is also true that ordinarily harbor and channel improvements by dredging and deepening involve tributary and permanent "works" like retaining walls, riprap, mattresses, etc.

Without, however, attempting authoritatively to delimit this subject and say what things are embraced in the term "public works," I am very certain that vessels under construction for the navy establishment are not, either in common acceptation or within legal intendments. Mr. Griggs, in the opinion cited above, points out the bearing upon the inquiry of the ordinary contracts for construction which have been substantially uniform for a long period, the title to the vessel remaining in the contractor until its completion and acceptance by the Government.

The contracts affected by the present inquiry provide for a Government lien, as payments on account are made for various preliminary trials and preliminary and conditional acceptance, for final trial and acceptance, and for forfeiture in a certain contingency and the vesting of title in the Government thereupon, all showing that complete title does not rest in the Government until the conditions and covenants specified are fulfilled.

In a case involving a similar point (*Clarkson* v. *Stevens*, 106 U. S., 505, 515–517) the Supreme Court has held that—

"Accordingly, we are of opinion that the fact that advances were made out of the purchase money, according to the contract, for the cost of the work as it progressed and that the Government was authorized to require the presence of an agent to join in certifying to the accounts, are not conclusive evidence of an intent that the property in the ship

should vest in the United States prior to final delivery. Indeed, in reference to the latter circumstance, it is noticeable as indicating a contrary intention that the authority of the inspecting officer was expressly limited, so that it should not extend to a right to judge of the quality and fitness of the materials or workmanship, such matters and all others concerning the performance of the contract being reserved for determination after the completion of the work as a condition of acceptance and final payment. * * *

"It is thus apparent, as we think, from these stipulations that the vessel was in all respects to be at the risk of the builder until, upon its completion, the United States should accept it upon final examination and certificate as conforming in every particular with the requirements of the contract, and answering the description and warranty of an efficient steam battery for harbor defense, shot and shell proof."

That opinion quotes the rule laid down in *Williams* v. *Jackman*, 16 Gray, 514, viz:

"Under a contract for supplying labor and materials and making a chattel no property passes to the vendee till the chattel is completed and delivered or ready to be delivered. This is a general rule of law. It must prevail in all cases unless a contrary intent is expressed or clearly implied from the terms of the contract."

(See also *United States* v. *Ollinger*, 55 Fed. Rep., 959.)

Further, the uniform construction of the Navy Department appears to have been that neither the act of 1892 nor the act of 1894 (supra) applies to contracts for the construction of vessels for the Navy. And, finally, it seems that various bills have been introduced in Congress since 1892 to extend the eight-hour limitation of the work of laborers and mechanics to the performance of all contracts entered into by the Government, but no such measure has been enacted into law. If that is the proper policy of the Government and ought to be the law, it is for Congress in the exercise of its judgment and discretion so to provide.

A distinction is manifest under certain State statutes and decisions between "public work" (in the singular) and "public works," suggesting generally the difference between

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the process or activity and the product or completed thing. "Public work," therefore, may be a broader conception than "public works." But it is not necessary to pursue that analysis for the purposes of the present question, because "public works" is the phrase used in all Federal statutes on the subject, so far as I can discover, and it is the phrase used in the act of 1892.

My conclusion, therefore, is that the act of August 1, 1892, limiting the hours of service of laborers and mechanics employed on the public works of the United States and of the District of Columbia does not apply to vessels under construction for the Navy by contract with builders at private establishments. The case of material for such vessels, as, for instance, armor, guns, and other articles obtained under special contracts, is *a fortiori;* and, besides, rests fully on the ruling of Attorney-General Miller in 20 Op., 454, as above cited, which is hereby expressly approved and affirmed.

Very respectfully,

HENRY M. HOYT,
Solicitor-General.

Approved:
W. H. MOODY.

The SECRETARY OF THE NAVY.

EIGHT-HOUR LAW—CONTRACTORS FURNISHING QUARTERMASTER'S SUPPLIES.

The act of August 1, 1892 (27 Stat., 340), known as the eight-hour law, does not apply to contractors furnishing the Quartermaster's Department with supplies.

DEPARTMENT OF JUSTICE,
August 4, 1906.

SIR: Your letter of July 25 asks the question, Whether the eight-hour law of August 1, 1892 (27 Stat., 340), should be construed as applying to contractors furnishing the Quartermaster's Department with supplies.

I have the honor to answer your question as follows: The act provides

"That the service and employment of all laborers and

mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or sub-contractor upon any of the public works of the United States or of the said District of Columbia is hereby limited and restricted to eight hours in any one calendar day * * *."

In 20 Op., 459, Attorney-General Miller held that the law applies generally to laborers and mechanics in the direct employment of the Government and the District, and that the limitation to *public works* applies only to such persons in the employ of contractors (opinion of August 27, 1892).

In 20 Op., 454 (August 24, 1892), there was a contract to furnish certain supplies for various public buildings. Mr. Miller held that the law did not apply to such contracts. The question put to him was: "Whether or not a contract for the supply of the above-named articles would be embraced within the provisions of the so-called eight-hour law (approved August 1, 1892) under the designation of 'public works.'" Mr. Miller said:

"From your statement of facts it does not appear that the persons who furnish the lock boxes, lock drawers, etc., are to do any work upon the public buildings. So far as appears, they simply contract to deliver to the Government, at the freight depot at the various points of destination, the goods in question. In other words, their contract is a contract for the furnishing of materials to be used in public buildings and not for the service and employment of laborers or mechanics to be employed upon such buildings. To hold that in purchasing materials to be used in the erection and fitting up of public buildings the requirement that such materials shall only have been manufactured by persons working eight hours a day would render this law impossible of execution. If the law is applicable to the goods you name, it is not seen why it would not be equally applicable to a purchase of spikes, nails, lumber, brick, etc., entering into the construction of Government buildings."

In an opinion which I have just rendered to the Secretary of the Navy [ante, p. 30], regarding the application of this law to the construction of vessels for the Navy under contract with private establishments, it is held that the law is

not applicable to such a contract, and also that the furnishing of equipment and material for such vessels—as, for instance, armor, guns, etc.—under special contract is not embraced within the law.

The case presented by you appears to me to be clearer even than the foregoing cases, for, presumably, quartermaster's supplies for the use of the Army are such as, generally speaking, are consumed sooner or later in the using. In the opinion to the Secretary of the Navy just cited I followed Mr. Miller's opinion of August 24, 1892 (*ut sup.*). I again approve that opinion, and therefore have the honor to answer your question in the negative.

Very respectfully,

HENRY M. HOYT,
Acting Attorney-General.

The SECRETARY OF WAR.

COMMISSARY STORES—ANNUAL REPORTS OF SALES.

Section 5 of the act of June 30, 1906 (34 Stat., 763), requiring the heads of Executive Departments or other Government establishments to furnish the Secretary of the Treasury annually a statement of all money received by them during the previous fiscal year, arising from proceeds of public property, applies to sales, and purchases from the proceeds of sales, of commissary stores, under section 3618, Revised Statutes, and the act of March 3, 1875 (18 Stat., 410).

DEPARTMENT OF JUSTICE,
August 8, 1906.

SIR: I have received your request for an opinion as follows:

"By section 5 of the act of Congress, approved June 30, 1906 (34 Stat., 763), it is provided as follows:

"'Hereafter the Secretary of the Treasury shall require, and it shall be the duty of the head of each Executive Department or other Government establishment to furnish him, within thirty days after the close of each fiscal year a statement of all money arising from proceeds of public property of any kind or from any source other than the postal service, received by said head of Department or other Government establishment during the previous fiscal year

for or on account of the public service, or in any other manner in the discharge of his official duties other than as salary or compensation, which was not paid into the General Treasury of the United States, together with a detailed account of all payments, if any, made from such funds during such year. All such statements, together with a similar statement applying to the Treasury Department, shall be transmitted by the Secretary of the Treasury to Congress at the beginning of each regular session.'

"Under section 3618 of the Revised Statutes, as amended, the proceeds of the sales of commissary stores are exempt from being covered into the Treasury.

"Under the act of March 3, 1875 (18 Stat., 410), authority of law is given for the use of funds appropriated for the subsistence of the Army, for the purchase of stores for sale to officers and enlisted men, and under the same act it is provided that the proceeds of the sales of subsistence supplies shall hereafter be exempt from being covered into the Treasury and shall be immediately available for the purchase of fresh supplies. Under the workings of this law, stores for sale are purchased and when sold an additional amount bought from the proceeds of such sales. In other words, purchases are made several times from the original amounts derived from the appropriation, the proceeds of sale of which when returned are placed to the credit of disbursing officers, but do not revert to the Treasury, and thus by the return of the money and repurchase of other stores and the resale of these new stores an erroneous impression is given that a very large sum of money is used in the purchase of sale stores. The report of the Commissary-General for the fiscal year ending June 30, 1905, shows that the amount received from sales of stores during the fiscal year and taken up for immediate disbursement amounted to $2,501,437.44, which is a sum arrived at by counting the gross amount of sales made. The amount originally expended for these stores was probably from one-fifth to one-tenth of the amount received from the sale of same, but was reexpended from five to ten times, and the stores sold the same number of times, making this aggregate. These sales take place at posts in all quarters wherever a garrison of

United States troops is stationed. It will appear therefore that a report is made of the amount received from sales of stores during the fiscal year and taken up for immediate disbursement. The section above quoted requires a report to be made within thirty days after the close of the fiscal year. To comply with same it would be necessary to receive the reports from all the widely scattered posts over the world, which reports from many of the posts it would be impossible to receive within thirty days after the close of the fiscal year. So that if this feature of the law is to be complied with it will be necessary to have the reports from Porto Rico, Alaska, Hawaiian Islands, and the Philippine Islands cabled from each post immediately after the 30th of June, and such cable would practically have to be an entire transcript of the monthly reports forwarded from the posts, and the expense of such cabling would be enormous.

"The law requires detailed accounts of all payments made from funds which are the proceeds of sales. As above stated, such funds lose their identity when they are placed to the credit of various disbursing officers, becoming absorbed on the books of the sub-treasuries and United States depositaries with the funds which have been advanced to those officers from the Treasury Department or other sources, and to comply with the law would require as many separate accounts current as there are separate origins from which the funds are obtained, and it would appear that the objects of section 3618 and the act of March 3, 1875, would be frustrated.

"To illustrate further how this matter applies at posts all over the country: The post commissary has to pay for the fresh beef and fresh vegetables delivered at the post, and we may estimate that such payments would require the sum of $700. His records show that he may expect to make sales of about $300 a month; and that he would have to pay about $100 as commutation of rations to enlisted men traveling under orders, men on furlough, sick in hospital, and hospital nurses; all of which objects are provided for in the appropriation bill. He would, therefore, need $500 to meet his obligations at the end of the month, which amount he requests to be placed to his credit in a designated depositary

by the chief commissary of the Department; which amount is so placed, being funds which had been advanced to the chief commissary, either directly through the Treasury or received by him from a purchasing commissary; which funds had either been advanced to the purchasing commissary directly from the Treasury or consist, in part, of some funds which have been turned in to him from proceeds of sales. At the end of the month the post commissary draws his check for the $500, pays the voucher for the beef and the balance in cash from funds received from sales. In case there is any balance of these funds received from sales, he deposits this in a depositary to his credit, and later on, if that balance is not required, it is invoiced to the chief commissary, who, in turn, later may invoice it to a purchasing commissary, by whom it is used for the purchase of new supplies under the authority of the section above quoted.

"In view of those apparently insuperable difficulties under the present method of accountability, and in view also of the provisions of section 3618 of the Revised Statutes and the act of March 3, 1875 (18 Stat., 410), I have the honor to request that you will advise this Department as to whether section 5 of the act of June 30, 1906, above quoted, applies to sales and purchases from the proceeds of such sales of commissary stores under section 3618, Revised Statutes, and said act of March 3, 1875."

I recognize the difficulties you speak of and the somewhat unusual nature of the dealings with the funds in question, but I see no impossibility in the way of complying with the act of Congress, supposing it intended to apply to such funds as these, nor do I see any reason to believe that it was not so intended. So far as the returns from distant places are concerned, the law should be complied with as nearly as reasonably may be in the matter of time and the returns sent by mail. They will be received in ample time for the report to Congress at the beginning of the session in December. It may, and doubtless will, be necessary to alter some of the methods of proceeding you speak of.

Congress has made no exceptions and we can not make any. It desires to know how wisely or unwisely the money not covered into the Treasury is expended and to know this

in detail; also to know how much of it there is and what needs are supplied by the use of it.

I am of opinion, therefore, that section 5 of the act of June 30, 1906, does apply to sales and purchases from the proceeds of sales of commissary stores under Revised Statutes 3618 and the act of March 3, 1875.

Respectfully,

CHARLES W. RUSSELL,
Acting Attorney-General.

The SECRETARY OF WAR.

CONTRACT LABOR—RAILROAD TRACK LABORERS.

Ordinary laborers, commonly employed in the construction and maintenance of the tracks of railroads, are not "skilled" laborers within the meaning of section 2 of the act of March 3, 1903 (32 Stat., 1214), and may not be imported into this country under contract in any event.

DEPARTMENT OF JUSTICE,
August 16, 1906.

SIR: In your letter of the 14th instant you state that the following questions have arisen in your Department in connection with the administration of the alien contract labor laws and ask for an expression of my opinion thereon.

"1. Are ordinary hands, commonly employed in the construction and maintenance of the tracks of railroads, "skilled" laborers within the meaning of the term as used in section 2 of the immigration act of March 3, 1903?

"2. If they are not skilled laborers, can such laborers be imported into this country under contract in any event?"

Prior to 1885 the practice was quite general for contractors, either directly or through agents, to import into this country large numbers of aliens under contract to perform labor or service here. The immigrants thus brought to our shores were, as a rule, greatly inferior to those who voluntarily came here, and the result was the displacement of our more intelligent American laborers with aliens who were willing to live under far less favorable conditions and to accept a less wage. Congress was appealed to and, after a very thorough discussion, the contract labor law, so-called, of

1885 was enacted. (23 Stat., 332.) The applicable portions of sections 1 and 5 of that act are as follows:

"SECTION 1. That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, *to perform labor or service of any kind* in the United States, its Territories, or the District of Columbia.

"SEC. 5. * * * nor shall this act be so construed as to prevent any person, or persons, partnership, or corporation from engaging, under contract or agreement, *skilled* workmen in foreign countries to perform labor in the United States in or upon any new industry not at present established in the United States: *Provided*, That *skilled* labor for that purpose can not be otherwise obtained."

Mr. Foran, a member of the Committee on Labor in charge of the bill, in a discussion on the floor of the House, in defining the objects of the bill, said:

"Its object is to restrict and prohibit the importation of foreigners to this country under contract to perform labor here. That is, its object is to prevent and prohibit men whose love of self is above their love of country and humanity from importing into this country large bodies of foreign laborers to take the places of and crowd out American laborers. It also prohibits the importation of *skilled workmen* to take the place of American *skilled artisans*." [Cong. Rec., vol. 15, p. 5349.]

In the Senate the exception in section 5 of the act in favor of skilled laborers for new industries received careful consideration. During the discussion of a motion to strike out the exception Senator Blair said:

"The Senate and Senator perhaps will observe that the proposition which he moves to strike out is one which reserves to the country, to capital and to labor alike, the opportunity for the establishment of such industries, if

there are any, as do not already exist in our country, and leaves open the power to American capital and enterprise and to American labor to secure from foreign countries the necessary skilled workmen to establish a new industry and to instruct the American laborer in the secrets and mysteries of the art. It has no application where the industry is already established in this country. It does not reach the iron industry nor the glass industry, nor any other industry which now flourishes upon American soil. It simply gives us the opportunity to establish new industries if there should be any occasion to do so, and thus affords the opportunity for additional investment of American capital and the employment of American labor." [Cong. Rec., vol. 16, part 2, p. 1622.]

It was not questioned in either House that the law was designed to exclude and did exclude skilled as well as unskilled contract laborers. A careful analysis of the act and an examination of the debates and reports in Congress relative thereto lead to the conclusion that it was intended to draw a distinction between common unskilled labor and skilled labor. Did the language used in the act effectuate the intent of Congress? And if not, has subsequent legislation removed any doubt that may have been entertained as to the meaning of the original act?

The Supreme Court evidently thought the act divided labor into two classes, for the court intimated in the *Holy Trinity Church case* (143 U. S., 457) and in the *Laws case* (163 U. S., 258) that the act was intended to apply only to "*unskilled* labor." That question, however, was not before the court in either case.

In the *Trinity Church case* the question decided was that Congress, in the enactment of this law, did not have in mind "any purpose of staying the coming into this country of ministers of the gospel, or indeed of any class whose toil is that of the brain." And in the *Laws case* the decision of the court was that an alien chemist belonged to a recognized profession, and therefore was specifically exempt from the operation of the statute.

Subsequently the subject again engaged the attention of Congress, and the act of March 3, 1903 (32 Stat., 1213) resulted.

Section 2 of that act provides, *inter alia*, that *skilled* labor may be imported if labor of like kind unemployed can not be found in this country.

Section 4 provides:

"That it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any alien into the United States, in pursuance of any offer, solicitation, promise, or agreement, parol or special, express or implied, made previous to the importation of such alien to perform labor or service of any kind, *skilled or unskilled*, in the United States."

The words "skilled or unskilled," it will be seen, do not appear in the corresponding section of the original act. Their insertion, especially after the language used by the court in the two cases above referred to, is significant and controlling as to the intent of Congress.

The Century Dictionary defines skilled and unskilled labor as follows:

"*Skilled labor* is that employed in arts and handicrafts which have to be learned by apprenticeship or study and practice. *Unskilled labor* is that requiring no preparatory training."

The Standard Dictionary (Twentieth Century edition) defines *skilled* as "having or demanding skill, especially that obtained by long practical experience; expert; proficient; as, *skilled* workmen; *skilled* labor."

It is not difficult to perceive why Congress originally should have excepted from the operation of the law alien skilled laborers whose services were required on new industries and whose coming did not in any way disturb American labor. The skilled laborer is, as a rule, far more intelligent and independent than the unskilled laborer. It would be practically impossible for contractors and foreign agents to get together and control a large number of intelligent, skilled artisans, while no difficulty would be experienced in contracting abroad for large numbers of ignorant and servile unskilled laborers. It is probable experience demonstrated that very few skilled laborers were brought to this country under the provisions of section 5 of the act of

1885. For this reason when the law came to be amended in 1903 it was not deemed necessary to limit the exception to its operation to new industries, as was the case in the original act. In other words, Congress, recognizing the vast difference between skilled and unskilled labor, concluded that it might with perfect safety permit *skilled* labor to be imported in all cases where "labor of like kind unemployed could not be found in this country." But no such exception was made in favor of the importation of unskilled labor. Indeed, to rule otherwise would, in effect, nullify the whole law.

The act was designed and intended for the protection and security of the American laborer, whose welfare every patriotic citizen is bound to promote. Laws designed for his benefit should, if possible, be so construed as to effectuate rather than retard the objects for which they were enacted.

The legislation with which we are now concerned has been on the statute books in substantially its present form for more than twenty years. As previously pointed out, the original act divided labor into two classes—skilled and unskilled. It first denounced the bringing in of either class under contract. For reasons of public policy Congress then excepted from the operation of the law skilled labor on new industries. The courts having intimated that the law was designed to apply to unskilled labor only, Congress took occasion to make clear its intent. The act of 1903 contains the unequivocal provision that the act shall apply to skilled as well as unskilled labor. In this act, which is now in force, the distinction between the two classes of labor is still maintained. It is therein provided that neither class shall be brought in under contract. No exception whatever is contained in the act in respect to unskilled labor, but it is provided that skilled labor may be imported under certain conditions. That there is a difference in fact and in law between skilled and unskilled labor is too plain to admit of argument.

It must also be presumed that Congress was mindful of this difference in the enactment of this law. It is certainly not for the executive department of the Government to

nullify the will of Congress by declining or failing to give the words of the act their natural and logical import. Especially is this true in a case involving the welfare of such a very large number of our own citizens. Moreover, it does not appear that since the enactment of this law in 1885 it has ever before been contended that unskilled alien contract labor could legally be imported.

The determination of the question as to what is skilled and what unskilled labor within the meaning of the law rests largely with you. I entertain no doubt, however, that "ordinary hands, commonly employed in the construction and maintenance of the tracks of railroads," are not skilled laborers within the meaning of the immigration act of March 3, 1903. Having reached the conclusion that they are not skilled laborers, it follows from what I have previously said that such laborers may not "be imported into this country under contract in any event."

Very respectfully,

CHARLES H. ROBB,
Acting Attorney-General.

The SECRETARY OF COMMERCE AND LABOR.

REDUCED RAILWAY RATES—RECLAMATION SERVICE EMPLOYEES.

There is no provision in the act to regulate commerce (act of February 3, 1887, 24 Stat., 379), or in its various amendments, which justifies the granting of reduced rates by railroads to employees of the Reclamation Service and dependent members of their families and servants accompanying them, and laborers destined for work in that service.

If railroads accord these reduced rates, they will be obliged to grant the same rates to the public in general in order to avoid a violation of section 2 of the act of June 29, 1906 (34 Stat., 584, 587).

DEPARTMENT OF JUSTICE,
September 8, 1906.

SIR: I beg to answer hereby the following inquiries of your letter of August 25, which arise upon an existing arrangement between the Reclamation Service of the Geological Survey and certain railroads west of Chicago:

"First. Is it legal to classify the employees of the Reclamation Service, dependent members of their families, and

servants accompanying them, when traveling at their own expense, and accord them less rates than the public?

"Second. Is it legal to classify the laborers in parties of five or more on one ticket and accord less rates for them than for the public?

"Third. If the railroads accord these reduced rates, will they have to grant the same rates to the public generally?"

It seems that under the arrangement in question special rates are granted for the transportation of the employees of the Reclamation Service, dependent members of their families, and servants accompanying them, when traveling at their own expense, and for laborers moving from labor centers to work on irrigation projects.

The interstate-commerce act, as amended by the act of June 29, 1906, provides (section 2, amending section 6 of the previous act of March 2, 1889,) that every common carrier subject to the act shall file with the Interstate Commerce Commission and print and keep open to public inspection schedules of all rates, fares, and charges for transportation: that no change shall be made in the schedules thus filed and published and in force except after thirty days' notice to the Commission and to the public:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to *any* shipper or *person* any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

In time of actual or threatened war preference and precedence shall be given to the transportation of troops and material of war.

Section 22 of the original interstate-commerce act (February 3, 1887, 24 Stat., 379), as amended by section 9 of the act of March 2, 1889 (25 Stat., 855), and the act of February 8, 1895 (28 Stat., 643), which was not amended by the rate

act of June 29, 1906, creates the following exceptions to the carriage of passengers and freight without preference, viz:

"That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets."

Nothing in the act is to be construed to prohibit reduced rates for ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national or State soldiers' and sailors' homes.

That section and section 1 of the rate act of 1906 provide for free carriage to railroad officers and employees and to certain other persons, being generally the same classes as are excepted by the provisions for reduced rates. But the act mentions no other persons who may receive reduced rates, and the only exceptions in favor of the Government are those above specified relating to the transportation of troops and materials of war and of *property* for the United States Government.

An opinion of the Attorney-General of April 25, 1905 (25 Op., 408), held that *materials* and *machinery* used for work upon irrigation systems in the West, being property which entered into the construction of a public work of the United States, were entitled to reduced rates as agreed upon between the railroad companies concerned and the Government so long as the Government received the whole benefit of the concession.

An opinion of Mr. Cooley, Chairman of the Interstate Commerce Commission, dated April 18, 1887 (1 I. C. C., 15), held that the transportation of supplies for the Indian service was the carriage of property "for the United States" within the meaning of section 22 and was not subject to the regular published rates.

In view of the foregoing, I have the honor to advise you that there does not appear to be any provision in the act

to regulate commerce and its various amendments which would justify the existing arrangement for reduced rates to employees, etc., of the Reclamation Service and laborers destined for work in that Service; and if these concessions are made, it appears clear that, in order to avoid violation of the law, the railroads in question would have to grant the same rates to the public in general.

Respectfully,

HENRY M. HOYT,
Solicitor-General.

Approved:
W. H. MOODY.

The SECRETARY OF THE INTERIOR.

MEAT INSPECTION LAW—IMPORTED MEATS.

The prohibition upon transportation contained in the meat inspection amendment to the agricultural appropriation act of June 30, 1906 (34 Stat., 676), does not apply to meat and meat food products imported from foreign countries.

DEPARTMENT OF JUSTICE,
September 27, 1906.

SIR: In your communication of the 18th instant you ask to be advised whether the prohibition upon transportation contained in the following paragraph of what is known as the meat inspection amendment to the agricultural appropriation act, approved June 30, 1906 (34 Stat., 669, 674, 676), applies to meat and meat food products imported from foreign countries:

"That on and after October first, nineteen hundred and six, no person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as 'Inspected and passed,' in accordance with the terms of this act and with the rules

and regulations prescribed by the Secretary of Agriculture: *Provided*, That all meat and meat food products on hand on October first, nineteen hundred and six, at establishments where inspection has not been maintained, or which have been inspected under existing law, shall be examined and labeled under such rules and regulations as the Secretary of Agriculture shall prescribe, and then shall be allowed to be sold in interstate or foreign commerce."

This provision, on its face, prohibits the transportation in interstate commerce and to foreign countries of all carcasses, meat, and meat food products which have not been inspected, examined, and marked, as required by the act; and as imported meat and meat food products can not meet this test (no inspection being provided in the act for such articles), question you say has been made by importers, railroads, and others as to whether they are not excluded from transportation in interstate commerce. Exclusion from transportation in interstate commerce would amount to a restriction upon importation, since trade in such articles would be confined to the State wherein the port of entry is situated.

In determining the meaning of the provision in question reference must be had to the amendment in its entirety and the circumstances which gave rise to this legislation. Considering the amendment as a whole in the light of such circumstances, I fail to perceive any support whatever for the suggestion that Congress intended thereby to prohibit the interstate or foreign transportation of meat and meat food products imported from foreign countries.

It is well known that the legislation in question was enacted by Congress immediately in response to the message of the President of June 4, 1906, transmitting the report of Messrs. Reynolds and Neill, who had been appointed by him to investigate the conditions in the Chicago stock yards and packing houses. (40 Cong. Rec., 7800). In that message the President said:

"'The report shows that the stock yards and packing houses are not kept even reasonably clean, and that the method of handling and preparing food products is uncleanly and dangerous to health. Under existing law the National

Government has no power to enforce inspection of the many forms of prepared meat food products that are daily going from the packing houses into interstate commerce. Owing to an inadequate appropriation the Department of Agriculture is not even able to place inspectors in all establishments desiring them. The present law prohibits the shipment of uninspected meat to foreign countries, but there is no provision forbidding the shipment of uninspected meats in interstate commerce, and thus the avenues of interstate commerce are left open to traffic is diseased or spoiled meats. If, as has been alleged on seemingly good authority, further evils exist, such as the improper use of chemicals and dyes, the Government lacks power to remedy them. A law is needed which will enable the inspectors of the General Government to inspect and supervise from the hoof to the can the preparation of the meat food product. The evil seems to be much less in the sale of dressed carcasses than in the sale of canned and other prepared products, and very much less as regards products sent abroad than as regards those used at home.

* * * * * * *

"I urge the immediate enactment into law of provisions which will enable the Department of Agriculture adequately to inspect the meat and meat food products entering into interstate commerce and to supervise the methods of preparing the same, and to prescribe the sanitary conditions under which the work shall be performed. I therefore commend to your favorable consideration and urge the enactment of substantially the provisions known as Senate amendment No. 29 to the act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1907, as passed by the Senate, this amendment being commonly known as the 'Beveridge amendment.'"

The Beveridge amendment had been adopted by the Senate on May 25, 1906. (40 Cong. Rec., 7420.) On June 19, 1906, the House substituted for it an amendment recommended by the Committee on Agriculture (id., 8720), which subsequently became the law.

Both the Beveridge amendment and the House substitute had the same general object in view, namely, the inspection

"from the hoof to the can" of all meats prepared in the slaughtering and packing establishments of this country for shipment in interstate or foreign commerce. In other words, it was the domestic product and not the foreign article that Congress had in mind.

The first paragraph of the amendment finally adopted provides—

"That for the purpose of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, the Secretary of Agriculture, at his discretion, may cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine, and goats before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered, and the meat and meat food products thereof are to be used in interstate or foreign commerce." * * *

Having thus provided for an ante-mortem examination, Congress, in the next paragraph, provided that, "for the purposes hereinbefore set forth," the Secretary of Agriculture should cause to be made, by inspectors appointed for the purpose, "a post-mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human consumption at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce," thus in terms indicating that domestic establishments, and hence the domestic product, were alone in view.

Provision is also made for the examination and inspection of all meat-food products prepared for interstate or foreign commerce in said establishments, and the marking thereof as "Inspected and passed," or "Inspected and condemned," as circumstances may require.

It is further provided that "the Secretary of Agriculture shall cause an examination and inspection of all cattle, sheep, swine, and goats, and the food products thereof, slaughtered

and prepared *in the establishments hereinbefore described* for the purposes of interstate or foreign commerce to be made during the nighttime as well as during the daytime when the slaughtering of said cattle, sheep, swine, and goats, or the preparation of said food products is conducted during the nighttime."

Then follows the paragraph in question, forbidding, on and after October 1, 1906, the transportation in interstate commerce or to foreign countries of carcasses, meat or meat food products which have not been inspected, examined, and marked as "Inspected and passed," in accordance with the terms of the act and the rules and regulations prescribed by the Secretary of Agriculture.

As the act provides only for the inspection of cattle and meat slaughtered or prepared in domestic establishments, this provision manifestly can have no application to cattle or meats slaughtered or prepared abroad and imported into this country.

The scope of the act is also indicated by this paragraph of the amendment, which occurs further on (p. 8721):

"No person, firm, or corporation engaged in the interstate commerce of meat or meat food products shall transport or offer for transportation, sell or offer to sell any such meat or meat food products in any State or Territory, or in the District of Columbia, or any place under the jurisdiction of the United States other than in the State or Territory or in the District of Columbia or any place under the jurisdiction of the United States in which the slaughtering, packing, canning, rendering, or other similar establishment owned, leased, operated by said firm, person, or corporation is located unless and until said person, firm, or corporation shall have complied with all the provisions of this act."

It is significant that this provision, which emphasizes the fact that domestic establishments, and hence the domestic product, were alone in the contemplation of Congress, immediately followed the provision under discussion in the Beveridge amendment. It was shifted about in the House substitute, which was based on the Beveridge amendment, but apparently without any intention of altering its meaning.

The House also added to the provision in question the

proviso as to meat and meat food products on hand on October 1, 1906, at establishments where inspection was not maintained or which were inspected under existing law, which clearly has reference only to domestic establishments and their products.

The amendment also makes provision for the inspection of cattle, sheep, swine, and goats, and the carcasses and parts thereof, which, or the meat products of which, are intended or offered for export to foreign countries. But there is not in the entire amendment any reference to meat or meat products imported from foreign countries.

It is manifest, therefore, that Congress in this legislation was dealing entirely with domestic slaughtering and meat-packing establishments and their products. The subject of imported meat food products was, however, under consideration by it at the same time in another connection. I refer to the pure-food law, also approved June 30, 1906 (34 Stat., 768). That act forbids "the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or *from* any foreign country (it will be observed that the provision of the meat-inspection amendment in question only refers to transportation *to* any foreign country), or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded within the meaning of this act." Section 7 provides that for the purposes of the act an article shall be deemed to be adulterated (p. 770)—

"In the case of food:

"First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

"Second. If any substance has been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

"Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injuri-

ous to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.

"Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter."

The act further provides (p. 772):

"SEC. 11. The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request, from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe." * * *

For several years past the agricultural appropriation acts have contained provisions similar to those of section 11.

If the meat inspection amendment were held to forbid the interstate transportation of imported meat and meat food

products it would conflict with the intention of Congress as manifested in the pure food law, which plainly contemplates the importation, transportation, and delivery of such articles if pure and wholesome and not adulterated or misbranded within the meaning of the act. It is inconceivable that Congress, in two acts passed at the same time, should intend such diametrically opposed results. The exclusion of such articles from transportation, with the resulting restriction upon their importation, would also produce a considerable loss in the revenue. Imported meat products are dutiable under paragraphs 273–279 of the tariff of 1897, and you state that "immense quantities of imported sausage, gelatin, meat extract, and other meat food products come into the country every year and are handled by jobbers and distributed from the ports of entry throughout the United States."

It is clear therefore that the provision of the meat inspection amendment in question can not be held to apply to the transportation of imported meat and meat food products. As has been aptly said, "A thing may be within a statute but not within its letter, or within the letter and yet not within the statute. The intent of the lawmaker is the law." (*Jones* v. *Guaranty and Indemnity Co.*, 101 U. S., 622, 626.) A case well illustrating this principle is that of *Church of the Holy Trinity* v. *United States* (143 U. S., 457, 458), where it was held that the alien contract labor law did not apply to a contract for the services of a foreign clergyman, although such contract came within the letter of the statute.

Respectfully,

W. H. MOODY.

The SECRETARY OF AGRICULTURE.

NAVAL OFFICERS—RETIREMENT—RANK—GRADE.

A medical director in the Navy who after forty years of service was retired with the relative rank of commodore, but with the retired pay of a medical director, did not thereby receive an advance of grade within the meaning of the proviso to the naval appropriation act of June 29, 1906 (34 Stat., 554), and is therefore entitled to the increase of pay provided for by that act.

This relative rank of a higher grade sometimes conferred upon officers on retirement is only an honorary distinction, serving merely to fix their places, in precedence, with fellow officers. Such officers do not bear the title of the higher grade, but retain the title actually held by them on retirement.

DEPARTMENT OF JUSTICE,
October 5, 1906.

SIR: I have the honor to reply to your note of September 23, 1906, which, with its inclosures, requests my opinion upon the case there stated, in substance, as follows:

The act making appropriations for the naval service for the fiscal year ending 1907, approved June 29, 1906, provides:

"That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is borne on the official register of the Navy, and who has heretofore been or may hereafter be, retired on account of wounds or disability incident to the service or on account of age or forty years' service, may, * * * be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement * * * ."

Medical Director Francis M. Gunnell was commissioned assistant surgeon in the Navy in 1849, and has been in continuous service, with an excellent naval record, and is now borne upon the Naval Register as medical director, in which office he was commissioned in 1875 with the relative rank of captain. He served creditably through the civil war, otherwise than as a cadet, and on November 27, 1889, after more than forty years' service, was placed on the retired list with the relative rank of commodore, but with the retired pay of a medical director. He has never borne the title "commodore," but has been uniformly addressed by the Department and its officers as medical director.

Under the act of June 7, 1900 (31 Stat., 703), he was ordered to active duty as medical director, and is now perform-

ing such duty and is receiving the pay of medical director. He now claims that he is entitled to the additional pay provided in the provision before quoted, and your question is, in substance, whether he is so entitled.

He was in the grade of captain when retired, and the question upon which the one submitted depends is whether he then received an advance of grade within the meaning of the above proviso. If he did, he is by this proviso excluded from the benefits conferred by this act of 1906, and also because he is then "above the grade of captain."

By section 1457 Revised Statutes, officers of the Navy are generally placed on the retired list in the grade to which they belonged at the time of their retirement.

But by section 1481 Revised Statutes, officers of staff of the Navy, such as those of the medical, pay, and engineer corps, etc., having the relative rank of captain, are retired with the relative rank of commodore, or that of the next higher grade, the language being, "Shall * * * have the relative rank of commodore." Is this an advancement to the grade of commodore?

The distinction between rank and grade in both the Army and Navy is so long and so well understood that we can not suppose Congress ignorant or unmindful of it in this enactment, or that of the Personnel act, or the act of 1906. On the contrary, in the absence of anything to indicate a different meaning, we must take it that Congress used those words in their well-known and appropriate sense.

In view of this, it is most important to note that in section 1457, retiring officers generally, the language is, "Shall be placed on the retired list of officers of the *grade* to which they belonged respectively at the time of their retirement," and in section 1487, the officers shall "have the relative *rank* of commodore." In the Navy Personnel act (30 Stat., 1004), section 9, officers "shall be retired with the *rank* of * * * the next higher grade," and in section 11 the language is the same. In the act of 1906, now being considered, the language is, "with the *rank* and retired pay of one grade above that *actually* held by him at the time of retirement. It is quite safe to say that, in these carefully prepared enactments, when Congress said "grade" it meant that, and that

when it said "rank," it did not mean grade. We must, at any rate, assume that Congress meant what it plainly said.

Returning to section 1481 we find, without any apparent intention to change the actual grade of the officers referred to, the language is "shall, when retired, have the *relative rank* of commodore." Had Congress here intended a change of grade and not of rank merely, it would have used the word "grade" instead of "rank." But Congress said rank and not grade, and this leaves the officers there referred to in the same grade as before, but with the relative rank of the next higher grade.

And this would seem, from other considerations also, to be what Congress intended. As before said, section 1457 retired officers, generally, in their then grade and rank, while by section 1481, the staff officers there referred to were retired with the relative rank of the next higher grade, thus making a distinction in favor of the latter class. Then came the Navy Personnel act, which provides that both line and staff officers *thereafter* retired shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade.

Here, too, no change of *grade*, but of rank merely, was intended, but as the act referred only to subsequent retirements, it left officers previously retired excluded from its benefits.

Under these circumstances that portion of the act of 1906 we are now considering was enacted. One manifest purpose of this measure was to do away with the discrimination against officers previously retired, which was effected by the Personnel act. This it did by providing that all officers coming within its purview, whether previously or thereafter retired, should have the benefits thus conferred, but providing that the act shall not apply "to any officer who received an advance of grade at or since the date of his retirement." And as to all these officers alike this measure changes the pay from three-fourths the sea pay to the "retired pay of one grade above that actually held by him at the time of retirement."

It seems certain that this "above the *grade actually* held by him at the time of retirement." means something more

than "the *relative rank*" conferred by section 1481, and equally certain that, had Congress meant this "relative rank," it would have used that term, as it did in so many other cases when that was meant.

It is well understood in the Navy and Navy Department that this "relative rank" of a higher grade, which is sometimes conferred upon officers on retirement, is but an honorary distinction, serving merely to fix their place, in precedence, with their fellow officers, and is of no substantial value. These officers do not bear the title of this higher grade, and by a ruling of this Department, are not entitled to do so. They retain the grade and title "actually held by them on retirement." I can not think that this relative rank is the advancement to one grade above that "actually held" on retirement, or the substantial advancement of *grade* contemplated by the proviso here considered as sufficient to bar the officer from the benefit of this provision.

It will be noticed that this proviso excludes from the benefit of the act officers who at or after their retirement received an advance in grade, although with no increase of pay, while under the Personnel act all officers *thereafter* retired are given the rank and three-fourths the sea pay of the next higher grade. If this makes an unfair discrimination against any officer who, before the Personnel act, was retired in an advanced grade, the remedy is with Congress. That question is not before me, and I confine myself to the question submitted.

I am therefore of opinion that Medical Director Gunnell is not, by virtue of his retirement with the relative rank of commodore, above the grade of captain; that he has not "received an advance of grade at or since the date of his retirement," within the meaning of the proviso of the act of June 29, 1906; and that he is entitled to the increased pay provided for in said act.

Respectfully,

M. D. PURDY,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

PHILIPPINE GOVERNMENT—FORESTRY LAWS—MILITARY RESERVATIONS.

The Philippine government can not extend its forestry laws to the military reservations on those islands.

DEPARTMENT OF JUSTICE,
October 10, 1906.

SIR: I have your request for an opinion upon the question whether the government of the Philippine Islands can subject military reservations in those islands to the forestry laws thereof. The doubt on this subject bears chiefly upon section 18 of the act of Congress of July 1, 1902 (32 Stat., 696), which provides:

"That the forest law and regulations now in force in the Philippine Islands, with such modifications and amendments as may be made by the government of said islands, are hereby continued in force, and no timber lands forming part of the public domain shall be sold, leased, or entered until the government of said islands, upon the certification of the forestry bureau that said lands are more valuable for agriculture than for forest uses, shall declare such lands so certified to be agricultural in character: *Provided*, That the said government shall have the right and is hereby empowered to issue licenses to cut, harvest, or collect timber or other forest products *on reserved* or unreserved *public lands* in said islands in accordance with the forest laws and regulations hereinbefore mentioned and under the provisions of this act, and the said government may lease land to any person or persons holding such licenses, sufficient for a mill site, not to exceed four hectares in extent, and may grant rights of way to enable such person or persons to get access to the lands to which such licenses apply."

Section 12 places under the Philippine government all lands except "military and other reservations" made by the President.

Section 13 provides that the government of the Philippine Islands, subject to the provisions of this act and except as herein provided, shall classify according to "its" agricultural character and make rules for the immediate lease, sale, or other disposition of the public lands other than timber or

mineral lands. Section 14 provides for the perfecting of titles "to public lands in said islands" initiated under the Spanish régime, and for the issuance of patents. Section 15 authorizes the Philippine government to provide for "the granting or sale and conveyance to actual occupants and settlers and other citizens of such islands such parts and portions of the public domain, other than timber and mineral lands, of the United States in said islands as it may deem wise," not exceeding a certain quantity to an individual and another quantity to a corporation. Section 17 forbids the destruction or appropriation of forest products on lands leased or demised by the Philippine government under the provisions of the act, except by permission and under regulation, and provides for the covering into the insular treasury of all moneys obtained from the lease or sale of any portion of the public domain or from licenses to cut timber, to be appropriated only for insular purposes. Section 19 authorizes the Philippine government to make reservations of public lands for the protection of the water supply, and for other public purposes not in conflict with the provisions of the act, and section 20 reserves from sale public lands valuable for minerals.

Thus upon the face of the organic law and immediately connected with section 18 we find a great variety of lands on which the phrase "reserved public lands" in section 18 may operate. These are vast tracts, for the most part, segregated from the mass of public lands, not intended to be used as sites for government buildings, but to be withheld from sale, in some cases to be disposed of later and in others to constitute what we know as "forest reserves."

Section 18, read in connection with the legislative plan, as shown by sections 12 to 17, can not be regarded as embracing "military and other reservations of the Government of the United States" merely because of the generality of the words "reserved or unreserved public lands." Undoubtedly Congress was legislating with an implied exception intended to be carried down from section 12. There is as much reason for saying that the Philippine government was authorized to sell such military and other Presidential reservations to a corporation under section 15 and keep the

price of the sales under section 17, because they might be included in "such parts and portions of the public domain of the United States in said islands as it may deem wise" to sell to a corporation, as there is for saying that the Philippine government was intended to lease sawmill sites and grant rights of way upon such reservations under section 18 and keep the receipts therefor under section 17. It can not be supposed, without the strongest reason, that Congress intended in section 18 to authorize the Philippine government to exploit for its own benefit Federal military and all other Federal reservations, after expressly excepting them in section 12 from the lands "placed under the control of the government of said islands to be administered for the benefit of the inhabitants thereof."

For these reasons I am of the opinion that the Philippine government can not extend its forestry laws to the military reservations in those islands.

Respectfully,

W. H. MOODY.

The SECRETARY OF WAR.

EIGHT-HOUR LAW—RECLAMATION SERVICE.

There is no conflict between the declaration in section 4 of the reclamation act of June 17, 1902 (32 Stat., 388), that eight hours shall constitute a day's work upon the public works therein specified, and the saving clause in section 1 of the act of August 1, 1892 (27 Stat., 340), which allows more than eight hours work in one calendar day "in case of extraordinary emergency."

Irrigation works for the reclamation of arid and semi-arid lands, act of June 17, 1902 (32 Stat., 388), perfectly and comprehensively fill the idea of "public works of the United States."

The eight-hour law contemplated by the act of August 1, 1892 (27 Stat., 340), means eight hours of effective labor.

The blasting, cleaning of tracks, repair of machinery, and all other similar matters incident to the reclamation work, essential to prompt and continuous service in the regular day, may legally be done before and after regular hours. The law does not prescribe in what hours of the day the labor shall be done.

Blacksmiths and their helpers, firemen, and pumpmen are either mechanics or laborers within the meaning of the eight-hour law.

The status of teamsters, cooks, and flunkies not determined. [See 20 Op., 459.]

It is the duty of the engineers of the Reclamation Service to see that the eight-hour law is observed by the contractors and to report violations of that law.

DEPARTMENT OF JUSTICE,
October 11, 1906.

SIR: Your letter of September 21 raises the question of the application of the eight-hour law to the Reclamation Service of the Geological Survey, and requests my opinion upon the following points:

"(1) Is the proviso to section 4 of the act of June 17, 1902, *supra*, which declares in part, 'That in all construction work eight hours shall constitute a day's work,' to be regarded as in anywise repealing or modifying that provision of the act of August 1, 1892, which makes it unlawful to employ or permit laborers to work more than eight hours in any one calendar day on any public works of the United States 'except in case of extraordinary emergency.' Differently stated, is the declaration in the act of June 17, 1902, that eight hours shall constitute a day's work upon the public works therein specified, in conflict with the saving clause in the act of August 1, 1892, which allows more than eight hours' work in one calendar day 'in case of extraordinary emergency?'

"(2) Are blacksmiths and their helpers, teamsters hauling camp supplies, etc., firemen, pumpmen, cooks, and flunkies to be classed as 'laborers and mechanics' within the meaning of these terms as employed in the act of August 1, 1892?

"(3) Are the engineers of the Reclamation Service responsible under the statutes in case the contractors on the works under their supervision shall require more than eight hours labor from laborers and mechanics upon these works?"

The letter of the Director of the Geological Survey states that it is dangerous both to life and property to do blasting during the regular hours of labor when the men and the steam shovel are at work; and that it is very necessary to keep the powder men at their posts after the regular working hours in order to make their final preparations for shooting the blasts. The letter also states that it is necessary to clean up the shale thrown down by the blasts upon the tracks before the regular working hours the following morning, in order that the force on the cuts and steam

shovel shall not then be standing around idle until the tracks can be cleaned. The same reason for work before or after the regular hours applies to the necessary shifting of track, shoeing of horses, repair and cleaning machinery, and to other labor essential to the promptness and efficiency of the regular day service of men and machinery. It is also suggested that if water for domestic use of the camp may not be hauled after regular working hours by some of the teams on the work, it would be necessary to keep an extra team for this purpose only, at much greater cost than "by putting in a little time by extra work;" and that teamsters hauling supplies, cooks, and "flunkies" (by which I understand scullions or assistants to cooks are meant) must put in more than eight hours per day.

The eight-hour law of 1892 (act of August 1, 1892, 27 Stat., 340) provides (sec. 1):

"That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or sub-contractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or sub-contractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

The reclamation act provides (act of June 17, 1902, sec. 4, 32 Stat., 388):

"In all construction work eight hours shall constitute a day's work."

There can be no doubt that under the terms of these laws and in the light of the discussions and opinions relative to the eight-hour law (20 Op., 454, 459; 23 Op., 174; 26 Op., 30, 36) "irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands" (sec. 1, Reclamation act) perfectly and comprehensively fill the idea of "public works of the United States." This conception is not weakened by the fact that

ultimately the management and operation of such irrigation works is to pass to the owners of the lands irrigated (sec. 6), for not only when constructed are all these irrigation works public works of the United States upon lands of the United States to be acquired by condemnation if necessary (sec. 7), but section 6 also provides "that the title to the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

But I think that the eight-hour day means eight hours of effective labor, and therefore so far as your questions present the case of laborers and mechanics who, from the exigencies of the situation, must wait until after the completion of the regular day to finish their work, I am of the opinion that the blasting, cleaning of tracks, repair of machinery, and all other similar work essential to prompt and continuous service in the regular day may be legally done before and after the regular hours. To be more specific, laborers and mechanics who are called upon to do two hours' work, for example, before or after the regular day begins or ends have no just cause for complaint that the law is violated if they are only called upon to work six more hours during the regular hours. The law gives no countenance to the conception that the interval between the beginning and end of the regular day is a controlling convention which excludes labor at any other time and entitles workmen to stand around idle if their services can not be fully availed of during that interval. The law limits the working day to eight hours, but it does not prescribe in what hours of the day the work shall be done. Practically, no doubt, there should be a real necessity, as is obviously the case here, for work during other hours than the regular day; and there should be scrutiny and care lest abuses arise which, however, the right of contract, subject to the law, between laborer and employer ought to prevent.

I do not wish to enter upon the *minima* of the case unnecessarily, and yet, noticing the claim that it would cost more to provide water for the camp unless it can be hauled on "extra time," I take occasion to observe that the element of cost makes no difference. The legality of the proceeding depends upon the consideration whether the men employed

shovel shall not then be standing around idle until the tracks can be cleaned. The same reason for work before or after the regular hours applies to the necessary shifting of track, shoeing of horses, repair and cleaning machinery, and to other labor essential to the promptness and efficiency of the regular day service of men and machinery. It is also suggested that if water for domestic use of the camp may not be hauled after regular working hours by some of the teams on the work, it would be necessary to keep an extra team for this purpose only, at much greater cost than "by putting in a little time by extra work;" and that teamsters hauling supplies, cooks, and "flunkies" (by which I understand scullions or assistants to cooks are meant) must put in more than eight hours per day.

The eight-hour law of 1892 (act of August 1, 1892, 27 Stat., 340) provides (sec. 1):

"That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or sub-contractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or sub-contractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

The reclamation act provides (act of June 17, 1902, sec. 4, 32 Stat., 388):

"In all construction work eight hours shall constitute a day's work."

There can be no doubt that under the terms of these laws and in the light of the discussions and opinions relative to the eight-hour law (20 Op., 454, 459; 23 Op., 174; 26 Op., 30, 36) "irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands" (sec. 1, Reclamation act) perfectly and comprehensively fill the idea of "public works of the United States." This conception is not weakened by the fact that

ultimately the management and operation of such irrigation works is to pass to the owners of the lands irrigated (sec. 6), for not only when constructed are all these irrigation works public works of the United States upon lands of the United States to be acquired by condemnation if necessary (sec. 7), but section 6 also provides "that the title to the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

But I think that the eight-hour day means eight hours of effective labor, and therefore so far as your questions present the case of laborers and mechanics who, from the exigencies of the situation, must wait until after the completion of the regular day to finish their work, I am of the opinion that the blasting, cleaning of tracks, repair of machinery, and all other similar work essential to prompt and continuous service in the regular day may be legally done before and after the regular hours. To be more specific, laborers and mechanics who are called upon to do two hours' work, for example, before or after the regular day begins or ends have no just cause for complaint that the law is violated if they are only called upon to work six more hours during the regular hours. The law gives no countenance to the conception that the interval between the beginning and end of the regular day is a controlling convention which excludes labor at any other time and entitles workmen to stand around idle if their services can not be fully availed of during that interval. The law limits the working day to eight hours, but it does not prescribe in what hours of the day the work shall be done. Practically, no doubt, there should be a real necessity, as is obviously the case here, for work during other hours than the regular day; and there should be scrutiny and care lest abuses arise which, however, the right of contract, subject to the law, between laborer and employer ought to prevent.

I do not wish to enter upon the *minima* of the case unnecessarily, and yet, noticing the claim that it would cost more to provide water for the camp unless it can be hauled on "extra time," I take occasion to observe that the element of cost makes no difference. The legality of the proceeding depends upon the consideration whether the men employed

on this service are laborers or mechanics, or whether they give, excluding this service, eight hours' effective labor.

Your inquiry whether the engineers of the Reclamation Service are responsible for the action of contractors in requiring more than eight hours' labor for laborers and mechanics is susceptible of two constructions. It is certainly my opinion that it is their duty to be vigilant in their scrutiny and to report violations of law which may come under their observation. This is not altogether a question of law for my determination, but rather, perhaps, a question of administration for you to settle in the light of the general executive policy. But as the question has been touched upon by my predecessor, Mr. Miller, I may properly express my view. The case of *United States* v. *Driscoll* (96 U. S., 421) has also been brought to my attention. That decision merely held that a workman for a contractor could not maintain a claim against the United States for compensation for labor over eight hours a day; that there was no privity between him and the United States. There was no occasion there for any intimation from the court regarding the administrative duty of the United States in respect to violations of the law by contractors, and, accordingly, no intimation whatever was given. There is a current misconception as to the scope of Attorney-General Miller's opinion (20 Op., 501). Mr. Miller was requested by the Secretary of the Treasury, at the instance of a contractor, to determine whether laborers and mechanics engaged by the contractor to carry out a contract by the Government came within the application of the eight hour law. Mr. Miller declined to answer the inquiry, on the ground that it was not a question of law arising in the administration of the Treasury Department. The inquiry was in reality the inquiry of the contractor, and with that fact in mind, doubtless, Mr. Miller observed that—

"The duty to employ, direct, or control such laborers or mechanics, and the penalty of their wrongful employment is with the contractor and not with the Government or any of its officers or agents."

But Mr. Miller does not by this remark undertake to determine what the deliberate executive policy on the subject might or should be. My own view of the matter, as

now squarely presented, is that it is the duty of the engineers of the Reclamation Service under your direction to see to it that the law is observed by the contractors and to report any violation of it which comes under their observation. I understand this to be the sense in which you ask whether they are responsible—not in the sense of legal liability to the workmen.

Recurring, then, to your questions, as to the first my answer is that there is no conflict between the act of August 1, 1892, and the proviso to section 4 of the act of June 17, 1902. The "extraordinary emergency" of the former act would apply to the latter. The acts are to be construed together, and I do not think it was the intention of Congress, by the proviso in the Reclamation act and the use of the term "construction work," either to displace the provisions of the act of August 1, 1892, as to laborers and mechanics not strictly engaged in "construction work," or to exclude the exception of an "extraordinary emergency." It is not necessary for me to define generally what an extraordinary emergency is, and it is clear to me that the facts in this case do not present an extraordinary emergency as intended by the law. But, with the qualifications which I have stated, I wish to make it clear that the eight hour law applies fully to contractors on the irrigation works constructed by the United States.

Your second question I have answered, as far as the facts before me permit; but I may add that it seems clear to me that blacksmiths and their helpers, firemen and pumpmen are either mechanics or laborers. As to teamsters, cooks, and "flunkies," I leave the inquiry as to their status where Mr. Miller left a similar query in 20 Op., 459, and add the remark that the obvious necessity of eight hours' effective labor in any case seems to dispose of that point as now raised. The answer to the third question, as already indicated, is that engineers of the Reclamation Service are responsible to the extent of requiring the law to be observed and reporting violations of it.

Very respectfully,

W. H. MOODY.

The SECRETARY OF THE INTERIOR.

OFFICIAL BONDS—SUBSTITUTE BOND—DISCHARGE OF SURETY.

Bonds of officers of the United States given for the faithful discharge of their duties, which are not in terms limited to a specified period expressed in dates, remain in full force and effect so long as such officers continue in office, even though another and different bond be given by way of renewal.

A provision in an official bond shortening the life of the bond from the entire period during which the office is held until such time as "a new official bond shall be accepted by the proper authority and substituted" therefor, runs counter to the statute and would be without effect. In its other particulars the bond would be good.

This, however, does not apply to the bonds of postmasters and collectors of internal revenue, to the sureties on which Congress has extended a degree of immunity.

DEPARTMENT OF JUSTICE,
October 17, 1906.

SIR: I have the honor to acknowledge the receipt of your letter of June 8, 1906, in which you inclose the official bond of Harvey P. Peairs, superintendent of the Haskell Institute, at Lawrence, Kans., and special disbursing agent, which contains a clause intended to limit its duration to the time when a new official bond shall be accepted by the proper authority. You state that the bond, having been approved by the Secretary of the Interior and transmitted to the Treasury Department for file, was referred to the Solicitor of the Treasury, and that, while that officer has approved the bond as legally sufficient, he has qualified his approval with the words, "but not as a substitute bond." You further state that the insertion of the words "until a new official bond shall be accepted by the proper authority and substituted for this obligation" in this bond are intended to overcome the embarrassing effect of existing law, under which renewal bonds do not operate as a discharge of the bonds theretofore given, and you ask an opinion as to whether the cumulative effect of renewal bonds may be safely overcome in the manner specified, and whether the words chosen will best accomplish the desired result. You also ask whether such course would be wise where the form of the bond is recited in the statutes, and if legislation is con-

sidered necessary you ask for an expression of my views as to the appropriateness of the draft of a bill which you inclose.

The unreported case of *Simpson* v. *The Fidelity and Deposit Company* (Supreme Court District of Columbia), which you cite and with which the Department is familiar, and numerous others, including those cited by the Comptroller of the Treasury in his opinion of June 17, 1899 (5 Dec., 918), to which you also call attention, leave no doubt in my mind that bonds given to the United States for the faithful discharge of their duties by officers thereof, which are not in terms limited to a specified period expressed in dates, remain in full force and effect so long as such officer continues in office, even though another and different bond by way of renewal may be given. A different view would obviously violate the terms of those bonds, which plainly contemplate the entire period of service of the officer, as indicated in the bond which you inclose by the words "all times and henceforth and during his holding and remaining in said office." That Congress recognized this continuing liability may be seen by reference to section 3837, Revised Statutes, which provides that the surety on the prior bond of postmasters shall be released, upon the giving of a new bond, from all responsibility for all acts or defaults of the postmaster which may be done or committed subsequent to the last day of the quarter in which such new bond shall be executed and accepted, and in the case of collectors of internal revenue as provided in section 2 of the act of March 1, 1879 (20 Stat., 327).

The liability of the surety on the old bonds, as well as that of those on the bonds given in renewal, thus continuing, the liability of the officer to his surety for premiums, if there be any, necessarily follows. I base this conclusion, however, upon the rule of the common law, not deeming it necessary to construe the second proviso to section 5 of the act of March 2, 1895, referred to in the Comptroller's decision of June 17, 1889. It is this continuing liability of both surety and principal which the words inserted in the bond you inclose, i. e., "until a new official bond shall be

accepted by the proper authority and substituted for this obligation," are designed to overreach. Whether this can legally be done is a matter requiring careful consideration.

On September 16, 1886, the Attorney-General rendered an opinion to the Secretary of the Treasury (18 Op., 458) holding that a departure in the official bond of Bradley B. Smalley, collector of customs for the district of Vermont, from the form recited in section 2619, Revised Statutes, by the omission of the words "in the State of Vermont," did not impair its validity, and that the bond was a valid one under either the statute or at common law. This opinion followed the holding of the Supreme Court of the United States in *United States* v. *Bradley* (10 Pet., 343); *Brown* v. *United States* (5 Pet., 372); *United States* v. *Linn* (15 Pet., 311); *United States* v. *Tingey* (5 Pet., 115); *United States* v. *Mora* (97 U. S., 421); *Jessup* v. *United States* (106 U. S., 147). In the latter case the court, after reviewing the authorities, says (p. 152):

"These authorities show that the United States can, without the authority of any statute, make a valid contract, and that when the form of contract is prescribed by the statute, a departure from its directions will not render the contract invalid. The bond is good at common law."

In the recent cases of *Moses* v. *United States* (166 U. S., 571) and *United States* v. *Dieckerhoff* (202 U. S., 302) this doctrine was affirmed, and in these two cases the court concluded by laying down the general rule that if the bond does not run counter to a statute and is neither *malum prohibitum* nor *malum in se* it is binding upon all parties. And even though it run counter to a statute in one or more of its provisions the bond is valid as to the others, provided they are properly severable from those which are invalid. *United States* v. *Mora*, supra, and *United States* v. *Hodson* (10 Wall., 395).

The question which confronts us, then, is whether the provision "until a new official bond shall be accepted by the proper authority and substituted for this obligation" in the bond which you inclose runs counter to a statute. The statutes requiring bonds to be given, perhaps without exception, do not declare any certain period of time during which

they are to run; they contemplate the entire period of service. Thus, in the bond you submit the words preceding the modification which you propose are "at all times and henceforth and during his holding and remaining in said office." A modification shortening the life of a bond from the entire period during which the office is held to such a time as a new obligation shall be entered into is so vital that I have no hesitation in saying that it runs counter to the statute, and applying the rule as laid down by the Supreme Court, it would seem that such a modification would be without effect, although, as we have seen, the bond in its other particulars would be good. Perhaps a different view might be taken if there were in the law any authority, general or special, vested in any officer of the Government to set aside existing law and to surrender the legal rights of the Government in the performance of those duties intrusted to him. In the very nature of things the business of the several Departments of the Government could not be transacted if their heads were dependent upon specific authority for each and every act necessary to the successful conduct of their Departments. At the inception of the Government Congress recognized this fact and wisely gave them much latitude in that behalf, as may be seen from section 161, Revised Statutes:

"The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

It will be observed that the only restriction upon heads of Departments is that they shall not prescribe regulations for the performance of the business of their Departments inconsistent with law; and with this the principle underlying the above-mentioned decisions of the Supreme Court is in full accord. Such an attempt to surrender the legal rights of the Government as is here contemplated is clearly within that restriction, and can not, therefore, be of any legal effect. This, of course, does not apply to the bonds of postmasters and collectors of internal revenue, to the

sureties on which, as indicated above, Congress has seen fit to extend some degree of immunity.

There remains the question as to whether the draft of the proposed amendment to the act of March 2, 1895 (28 Stat., 808), which you inclose, would, if enacted into law, operate to discharge the sureties on prior bonds when a renewal bond is given, and in that connection I have the honor to say that the amendment seems to me to be entirely appropriate and effective.

Very respectfully,

W. H. MOODY.

The SECRETARY OF THE TREASURY.

CONTRACT SURGEON—GOVERNMENT HOSPITAL FOR THE INSANE.

A contract surgeon, while serving as such in the Army, is a person belonging to the Army within the meaning of section 4843, Revised Statutes, and, if he becomes insane in such service, is entitled under that section to admission to the Government Hospital for the Insane.

DEPARTMENT OF JUSTICE,
October 27, 1906.

SIR: I have the honor to respond to your note of October 17, 1906, in which you ask my opinion whether a contract surgeon, becoming insane while in service, is eligible as such for admission into the Government Hospital for the Insane.

Section 4843, Revised Statutes, provides for the admission into that hospital of: (1) "Insane persons belonging to the Army, Navy, Marine Corps, and Revenue-Cutter Service. (2) Civilians employed in the Quartermaster's and Subsistence Departments of the Army, who may be or who may hereafter become insane while in such employment."

By an amendment of February 9, 1900 (31 Stat., 7), this was extended to the Pay Department.

The answer to your question depends upon the consideration whether a contract surgeon, while in service as such, is a person "belonging to the Army." The Army, as now constituted, is a somewhat heterogeneous body, composed not only of soldiers or fighting men, but also of many who perform no service that can be called military, except

as it is in connection with the military organization. What is strictly and technically "the Army," as defined by statute, includes many of these from the General Staff to chaplains, nurses, assistant and reserve nurses. So that, in order to belong to the Army, it is not necessary to be a soldier, or to perform any military service, except as all service in the Army may be called military service.

"The Army" is defined by the act of February 2, 1901 (31 Stat., 748), which provides "That from and after the approval of this act, the Army of the United States, including the existing organizations," shall consist of the various branches, departments, and officers enumerated, and then provides (sec. 18): "That the Medical Department shall consist of one Surgeon-General * * * eight Assistant Surgeons-General * * * ," and so on; "the Hospital Corps, as now authorized by law; and the Nurse Corps * * * ," all of whom belong to the Army. Then follows the proviso in immediate connection with and continuing the composition of that Department, "That in emergencies the Surgeon-General of the Army, with the approval of the Secretary of War, may appoint as many contract surgeons as may be necessary."

Now it is entirely certain that under this statute all who belong to this Medical Department, permanently or temporarily, belong to "the Army," even in the strict sense as defined by this act. And it seems equally certain that this proviso simply authorized the increase of the force in that Department by the *appointment*—not employment—of additional contract surgeons when an emergency required it. The whole section treats solely of the Medical Department and of those who compose it. All of the persons enumerated in this section are officers of the Medical Department and belong to the Army, and their service is in and for the Army. I do not think that when in emergencies additional persons are appointed to perform precisely the same service in or for the Army these are to be treated as not belonging to that organization.

The Army Regulations, paragraphs 1417 to 1421, having the force and effect of law, provide—

"That contract surgeons * * * are entitled to the

same respect and obedience from enlisted men as commissioned officers."

And that—

"A contract surgeon, though not eligible for detail on court-martial, may prefer charges against enlisted men and may be detailed on councils of administration and post treasurer," etc.

Then the act of April 23, 1904 (33 Stat., 262, 266), has this proviso:

"That when a contract surgeon is in charge of a hospital he shall have the same authority as a commissioned medical officer."

And I believe that contract surgeons have also a pensionable status.

It will be observed that the Hospital Corps and the Nurse Corps are specifically enumerated in section 18 as belonging to the Army, and there are particular provisions for the female portion of the Nurse Corps, including such reserve nurses as may be needed, in section 19. The status and service of these two corps are analogous and subordinate to the medical service, and it does not seem likely that Congress intended to recognize those corps more completely as a part of the Army than the medical men who, while only temporarily employed and not in the Regular permanent organization, nevertheless belong to the organization in the fullest practical sense when they are employed. In other words, it does not seem likely that Congress intended to confer any rights upon reserve nurses which they withheld from contract surgeons employed in emergencies.

It is true that contract surgeons are not officers in the sense of having grade or rank, but neither grade nor rank is essential to office or place. In respect to the place they fill and the service they render, with the attendant obligations and responsibilities, they are as much officers in the Medical Department as are assistant surgeons. But office is not necessary in order to belong to the Army. Officers in the Army are appointed by the President, but Congress may authorize the appointment of a contract surgeon in the Army without making him an officer.

I think that section 18 of the act of February 2, 1901,

above quoted, makes the Medical Department of the Army consist of the persons there enumerated, and, when serving as such, of the contract surgeons appointed thereunder, and that the other provisions here referred to clearly recognize them as belonging to the Army.

Furthermore, section 4843 is remedial in its character and, under a well-established principle, should receive a liberal instead of a strict construction.

Without further elaboration it is my opinion that, in construing the expression "insane persons belonging to the Army," we should adopt a construction which will extend rather than one which will restrict and limit the beneficent operation of this section, especially when there is no apparent reason for the narrower construction. Therefore, answering your question precisely, I am of opinion that a contract surgeon, while serving as such in the Army, is a person belonging to the Army within the meaning of section 4843, Revised Statutes, and, if he becomes insane in such service is entitled to admission to the Government Hospital for the Insane under that section.

Respectfully,

HENRY M. HOYT,
Acting Attorney-General.

The SECRETARY OF WAR.

GOVERNMENT CLERK—JUDGMENT DEBTOR—WITHHOLDING SALARY.

Section 1766, Revised Statutes, which provides that no compensation shall be paid to any person who is in arrears to the United States, does not apply to a clerk in the Government service (a pension agency) who is a judgment debtor of the United States.

The expression "until he has accounted for and paid into the Treasury all sums for which he may be liable," found in section 1766, does not refer to mere indebtedness, but clearly applies to one who has received Government moneys to be disbursed or covered into the Treasury.

DEPARTMENT OF JUSTICE,
November 7, 1906.

SIR: Your request for an opinion, dated September 13, 1906, presents the question whether a clerk in the Government service (a pension agency of the United States), who

is a judgment debtor of the United States, is liable to the provisions of section 1766, Revised Statutes, which provides:

"No money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the Treasury all sums for which he may be liable. In all cases where the pay or salary of any person is withheld in pursuance of this section, the accounting officers of the Treasury, if required to do so by the party, his agent, or attorney, shall report forthwith to the Solicitor of the Treasury the balance due; and the Solicitor shall, within sixty days thereafter, order suit to be commenced against such delinquent and his sureties."

As there is fairly some doubt regarding the exact meaning of the controlling expressions in this statute—"in arrears," "balance due," "such delinquent and his sureties"—we are justified in resorting to the original statute and others *in pari materia*.

The act of January 25, 1828 (4 Stat., 246), from which section 1766 was taken, provided "that no money hereafter appropriated shall be paid to any person, for his compensation, who is in arrears to the United States, until such person shall have accounted for, and paid into the Treasury, all sums for which he may be liable," with the proviso that this should not "be construed to extend to balances arising solely from the depreciation of Treasury notes received by such person, to be expended in the Government service," followed by a provision for report to the Treasury agent (now the Solicitor of the Treasury) and suit within certain days "against such delinquent and his sureties."

Earlier acts made similar provisions; for example the act of April 30, 1822 (3 Stat., 673), relating to appropriations for the military service, and the act of May 4 of that year relating to the Navy (Id., 677). See also the act of May 7, 1822 (Id., 688), the act of March 3, 1823 (Id., 763), and the act of April 2, 1824 (4 Stat., 17).

The general act of 1828 was "An act to prevent defalcations on the part of disbursing agents of the Government and for other purposes." The last phrase can hardly be regarded as intending to include other persons than disbursing agents. "It is true that it is also described as an act

'for other purposes,' but this part of the description is sufficiently answered by the closing provision, authorizing the party to demand a suit, and directing the agent of the Treasury to institute one" (3 Op., 52, 54). Substantially the only change made by the revisers was to omit from the Revised Statutes the proviso as to the depreciation of Treasury notes, and therefore it seems to me clear that section 1766 must be intended to mean what it signified in 1828 when it was formulated.

It is my view that in all those acts "any person" and "officer" who are not to receive advances of payments until they shall have accounted for and paid into the Treasury any sums for which they were liable, contemplated persons who, as contractors or disbursers, or both, of the public funds, or contractors or officers receiving advances, were in a relation of trust as such to the Government and would have in their hands sums or balances of public funds for which they were bound to render accounts and to turn the balance of moneys into the Treasury. These would naturally be in "arrears" and be in a position to have a "balance due" found by the accounting officers.

It might be argued that any person indebted to the Government whose debt is due is in arrears, but that is not the natural meaning of the phrase, which ordinarily implies a delay in accounting for money in one's hands or in discharging obligations on such account already partly discharged. The phrase would hardly have been used as equivalent to "in debt to the United States" or "indebted to the United States," since Congress must be presumed to have been familiar with the latter phrases and to know that they were far more apt to express its meaning if it intended to include any person who owed the Government a debt. The word "delinquent" looks to the same conclusion like the word "defaulter" in the act of May 4, 1822 (*supra*). A defaulter is one who fails to account for money with which he is intrusted, and a debtor is not a defaulter nor, indeed, delinquent, except in the general sense of that term.

Further, the clause "until he has accounted for and paid into the Treasury all sums for which he may be liable" is conclusive to my mind on the point. This language is not

appropriate to mere indebtedness, but plainly applies to one who has received Government moneys to be disbursed or covered into the Treasury. The original language, now omitted, relating to the depreciation of Treasury notes is a further indication that such persons were in view rather than any and all debtors whatsoever, and the provision that suit shall be commenced against the delinquent "and his sureties" indicates that Congress was not regarding mere debtors but the classes of persons who had sureties for the performance of contracts or their other duties, chiefly, of course, the receipt and disbursement of public moneys.

In the debates, it is true, some general language is used about debtors to the Government, but when precise terms were employed about the evils sought to be remedied, the language clearly enough specified persons having public moneys to account for.

Attorney-General Wirt, considering the act of 1824, held that—

"The phrase 'who is in arrears to the United States,' seems to me to apply naturally and properly only to persons who, having previous transactions of a pecuniary nature with the Government, are found, upon a settlement of those transactions, to be in arrears to the Government, by holding in their hands public moneys which they are bound to refund." (1 Op., 676.)

Attorney-General Butler, considering the act of 1828, approved and followed Mr. Wirt's opinion, saying:

"This shows that the cases contemplated by the legislature were those of persons with whom the Government had accounts composed of pecuniary items on both sides, and whose debts, consisting of the balances of such accounts, were usually reported by the accounting officers to the agent of the Treasury for suit." (3 Op., 54.)

The present provision of the law is substantially like the original act, and in the absence of strong reasons to the contrary, I am of the opinion that the construction placed upon a similar act by Mr. Wirt in 1824 and the original act by Mr. Butler in 1836 and respected until the date of the revision should be controlling, at least to the extent of preventing its application to an ordinary clerk who is a judgment

debtor of the Government under judgment for a debt growing out of transactions wholly foreign to his employment and having nothing to do with any advances of public moneys or any accounting therefor.

I do not undertake to say whether or not the Government has the right on general principles to do in any case what section 1766 makes compulsory in certain cases; but I have the honor to advise you that the section does not apply in the case submitted by you, and that you are not required to withhold the salary of the clerk in question.

Very respectfully,

W. H. MOODY.

The SECRETARY OF THE INTERIOR.

PANAMA CANAL APPROPRIATIONS—MARINE BARRACKS AT ANCON.

The Isthmian Canal Commission is legally empowered, acting under the direction of the President, to avail of the Panama Canal appropriations (acts of December 21, 1905, 34 Stat., 5, and June 30, 1906, 34 Stat., 697, 761, 762) for the purpose of erecting and maintaining marine barracks in the vicinity of Ancon, Isthmus of Panama.

The Navy appropriation act of June 29, 1906 (34 Stat., 553, 581), providing for the renting, leasing, improvement, and erection of barracks for the Marine Corps at Porto Rico, Hawaii, Guam, etc., "and at such other places as the public exigencies r. quire," although specific, is not exclusive.

The rule that a specific appropriation is exclusive, and that another general appropriation is not available for the same purpose, is a rule of administration firmly established by the accounting branch of the Government, and is not a statutory limitation. This rule, while a proper one, has obvious exceptions and limitations, and must be applied reasonably.

The relative jurisdictions of the Comptroller of the Treasury and of the Attorney-General over questions involving the payment of money out of the Treasury, reviewed, and opinion of December 22, 1904 (25 Op., 301), approved and followed.

DEPARTMENT OF JUSTICE,
November 16, 1906.

SIR: I have the honor to respond to your note of October 26, 1906, in which you advise me that "It is proposed to shortly erect in the vicinity of Ancon, Isthmus of Panama, permanent marine barracks for the proper housing of the

marine force situated within the Canal Zone;" and that "questions have arisen as to (1) the authority of the Isthmian Canal Commission to construct these barracks and to provide for their payment out of the funds appropriated to its use by the Congress, and as to (2) the duty of the Navy Department, as against the Isthmian Canal Commission, to assume this obligation."

You ask to be advised "whether there are any funds available for the construction of marine barracks by either the Isthmian Canal Commission or the Navy Department; and as to the relative duty and obligation between these two Departments of Government to assume the cost of erecting and the charge of maintaining the marine barracks in question."

Although the duty of housing and caring for the Marine Corps ordinarily appertains to the Navy Department, to which that corps belongs, yet I should find no difficulty in holding that the wide discretion and authority conferred upon the President by the Panama legislation (act of June 28, 1902, 32 Stat., 481) enable him and the Executive agency, the Isthmian Canal Commission, to avail of the canal appropriations (id., act of December 31, 1905, 34 Stat., 5; act of June 30, 1906, 34 Stat., 697, 761, 762) for the desired purpose, if other laws and principles do not prohibit.

But the act of June 29, 1906 (34 Stat., 553, 581), contains the following provision, which is also found in earlier annual appropriation acts for the naval service (e. g., act of July 1, 1902, 32 Stat., 662, 688; act of March 3, 1903, id., 1177, 1200; act of April 27, 1904, 33 Stat., 324, 349; act of March 3, 1905, id., 1092, 1115):

"*For repairs of barracks, Marine Corps:* Repairs and improvements to [enumerating particular barracks and structures]; for the renting, leasing, improvement, and erection of buildings in Porto Rico, the Territory of Hawaii, the Philippine Islands, at Guam, *and at such other places as the public exigencies require;* * * *"

This appropriation is specific and available whether adequate or not.

For years the rule has been established in the accounting service of the Government that when an appropriation has

been made for a specific object, that appropriation is exclusive and another more general appropriation is not available, on the theory that where Congress appropriates a specific sum for a specific object for the whole of a particular fiscal year, it is to be presumed that the sum so specified is all that Congress intends shall be used for that object for that fiscal year (3 Comp. Dec., 71; 6 id., 124; 7 id., 665; 9 id., 259; 10 id., 655; 12 id., 61). There is no such *statutory* limitation on the use of appropriations, but the rule has, perhaps, been recognized tacitly by Congress, since an act of June 7, 1897 (sec. 11, 30 Stat., 62, 93), expressly and exclusively gave to the Secretary of the Interior an authority contrary to the rule, viz, to use any general appropriation otherwise available where funds appropriated in specific terms for a particular object are insufficient. But it is to be remarked of this uniform ruling by Comptrollers, first, that it operates within a narrow range. That is to say, it has been a question whether some particular thing should be purchased out of an appropriation to which it was customarily charged as specific, or out of another in the same Department for incidental expenses; or whether appropriations for bureaus or contingent expenses of a Department could be availed of for preparing the exhibit of that Department at an exposition for which a specific appropriation was made; or whether when an appropriation for "packing boxes" *eo nomine* for the shipment of postal supplies is exhausted recourse might be had to an appropriation for "stationery," etc. See above citations. Second, it is also to be remarked that the Comptroller recognizes that two appropriations may sometimes be available—"cumulative" appropriations, as they are called—not only when one is technically a deficiency appropriation professedly supplying the lack in an earlier one (7 Comp. Dec., 142) but also where there are a more and a less specific appropriation without reference to a deficiency. For instance, there was a specific provision with a limited appropriation in an act of 1897 for animal quarantine stations, and in the same act a broad and general appropriation of a large sum with authority to the Secretary of Agriculture to use it in his discretion in the collection of informa-

tion concerning live stock and to prevent the spread of animal diseases, and it was held that notwithstanding the rule as to the exclusive use of a specific appropriation, the general appropriation might be used to pay part of the expense of the quarantine station service.

"While it is a rule that a specific appropriation excludes the use, for the same objects, of a general appropriation, yet when there are two appropriations, both applicable to the same object, they are to be treated as cumulative, and either or both can be used in the discretion of the head of the Department." (4 Comp. Dec., 121; see also 1 id., 357; 2 id., 59.)

Finally, the Comptroller has noticed certain reasonable limits to the applicability of the general rule. In 8 Comp. Dec., 685, referring to the rule that the more applicable appropriation is exclusive, he says that such rules are general rules of construction, and when confined to their legitimate functions are useful; but when by refinement of reasoning and logic they are made to serve the purpose of making an appropriation the most general in its language inapplicable to a legitimate object of a particular service, then these rules are being perverted, etc. And in 10 Comp. Dec., 832, considering an analogous matter, viz, the strict requirement of the statute that all printing should be done at the Government Printing Office unless otherwise authorized by law, in juxtaposition with the broad authority conferred by the appropriation to enforce the Sherman anti-trust law (32 Stat., 903), which might have been construed as necessarily limited to the payment of the salaries of special counsel and agents, the Comptroller throws aside that narrow view as a construction which would make the law utterly inoperative to accomplish the purposes for which it was enacted, saying: "Considering this appropriation in the light of the terms and the evident purposes for which it was made, it should be construed as providing for all the necessary and proper expenses incurred."

In all the foregoing exceptions to the accounting rule there is no exact analogy to the present case. For example, this is obviously not a case of cumulative appropriations within the meaning of the instances passed upon by the

Comptroller. It does not relate to a close association between different aspects of the same service in the same Department. It is not really an instance of a more and a less specific appropriation at all. The contrast is here sharply drawn between a specific appropriation for a particular object in one Department, and a broad authority to the Chief Executive without any precedent whatever, not supplying any deficiency for the specific object, and not manifesting by the general terms used any definite knowledge of that object or concern with it or any clear intention to make a new and cumulative provision to aid that object. On the other hand, the cases and situations before the Comptroller out of which the general rule grew, present no exact analogy either. They relate to technical matters of accounting purely within a narrow field, as I have said, and there is no instance discoverable where the Comptroller has passed upon such a case as is now presented and applied the narrow rule to the defeat, in a particular matter, of the broad purpose and untrammeled authority of a great legislative policy.

It may safely be said that if any statutes empowering executive action, with a wide discretion in matters of vital public concern, are to be construed liberally and should be untrammeled by this rule, and if a discretion conferred upon a secretary to expend a general appropriation for important objects of public policy, only generally defined, is not restricted by a specific appropriation, then the case is *a fortiori* here, where the President of the United States is acting for the accomplishment of the most important project of public works ever undertaken by this country, and under an authority which was given and was intended to be given with as wide a use of his personal judgment and discretion and with as little check and guidance from the legislature as is possible to conceive under the Constitution and organization of our Government. There can be no doubt, of course, that the use of military forces is a necessary part of the protection and government of the Canal work and Zone, and that many subordinate matters of police are involved in their employment. It is equally clear that the proper care of these forces, including their adequate housing

without delay in permanent structures erected with a view to the latitude and climate and to the demands of the modern science of hygiene, are matters altogether within the scope of the authority conferred upon the President and are imperative matters for his judgment and discretion to act upon.

But there is another matter which must be considered. Is the present question one which may be passed upon by the Attorney-General, or is it reserved for the exclusive decision of the Comptroller of the Treasury? The jurisdiction of the Comptroller has often been considered by my predecessors with reference to the act of July 31, 1894, sec. 8 (28 Stat., 162, 208), which provides:

"Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, *shall govern the Auditor and the Comptroller of the Treasury* in passing upon the account containing said disbursement."

It will be noted that the statute permits but does not require this reference of any question involving a payment to the Comptroller; and it is thus suggested that whatever the final action of the Auditor and Comptroller may be upon the account, the reference of every question to the Comptroller for decision is not demanded by the law simply because such a question may ultimately reach the accounting stage.

Mr. Olney, to avoid a conflict of precedents, held that the Attorney-General should not render opinions upon questions which could be referred to the Comptroller, *except in matters of great importance*, or where the question, "is a general one applicable to all the Departments," and even as to such questions he hesitated to express an opinion unless the Comptroller joined in the request (21 Op., 178; id., 181, 225, 402). Mr. Olney's view was followed by Mr. Griggs in a case within the rule and not within the exceptions (22 Op., 581, and previous opinions cited; 23 Op., 431), and by Mr. Knox (id. 468, 586); see also 24 Op., 85, 553; 25 Op., 185, 614;

while the question presented in 24 Op., 699, was held to be of sufficient importance to come within the exception (cf. 25 Op., 271).

In 25 Op., 301, 303, I had occasion to consider the subject anew, and stated that:

"I am unable, however, to agree to the proposition that the act of 1894 establishes a rule which is universal and without exception under all circumstances. While I do not challenge the authority of the Comptroller under that law to determine conclusively the question of the legality of a payment out of the public Treasury, I am nevertheless of the opinion that Congress intended to confine the power of the Comptroller within a relatively narrow range, and did not mean thereby to curtail the occasions for the rendering of opinions by the Attorney-General or to diminish their scope and weight. I do not believe that Congress by that enactment intended to shorten the reach of sections 354 and 356, Revised Statutes, as construed to give to opinions of the Attorney-General controlling authority (5 Op., 97; 6 Op., 334; 7 Op., 699; 9 Op., 37; 20 Op., 648), or to repeal *pro tanto* those laws.

"If a question is presented to the Attorney-General in accordance with law—that is, if it is submitted by the President or the head of a Department—if it is a question of law and actually arises in the administration of a department, and the Attorney-General is of opinion that the nature of the question is general and important in other directions than disbursement, and therefore conceives that it is proper for him to deliver his opinion, I think it is final and authoritative under the law, and should be so treated by the accounting officers, even if the question involves a payment to be made."

I have thus reviewed rather minutely the various aspects of the question presented, because it is most important in itself, because the relation of the Comptroller of the Treasury to the question is important, and because the rule that a specific appropriation is exclusive and the exceptions to that rule were established in his branch of the Government service. I am aware of no opinion of the Attorneys-General which distinctly recognizes the rule or has had occasion heretofore to deal with it.

quire sites for public buildings in a number of cities throughout the country. In each case the purposes for which the site was to be acquired were specified, e. g., a "United States post-office and court-house at Pierre, South Dakota; United States post-office and custom-house at Portsmouth, Virginia; United States post-office and land office at Natchitoches, Louisiana." For Albuquerque, a United States post-office only is provided.

True, the second proviso under section 5, of the act of 1902, states "that in acquiring sites under this section the Secretary of the Treasury shall take into consideration the present needs of the Government and the future growth of the cities enumerated, respectively; and in no case shall the Secretary of the Treasury acquire a site unless the dimensions thereof are of sufficient size for a building that will accommodate all the governmental offices now located or likely to be located in said cities, respectively." There is nothing in this, however, indicating an intention on the part of Congress to do more than secure enough land for the erection of a public building which should, at some future time, accommodate all governmental offices, if the necessity arose.

Turning to section 6, of the act of 1906, it is apparent that Congress intended to set forth specifically the purposes for which the buildings to be erected at the cities named in the bill were to be used, e. g., "United States post-office, court-house and other governmental offices at San Juan, Porto Rico; United States post-office and custom-house at Quincy, Massachusetts; United States post-office and court-house at Valdosta, Georgia," etc. For the second time, at Albuquerque, provision is made only for a post-office.

If Congress had intended to provide rooms for court or other governmental purposes, it would have been clearly indicated, as was done in the case of buildings to be erected elsewhere.

I am therefore of opinion that in erecting the public building at Albuquerque, N. Mex., you are authorized under existing legislation only to provide accommodations for the United States post-office.

Respectfully,

W. H. MOODY.

The SECRETARY OF THE TREASURY.

SUBIG BAY NAVAL RESERVATION—JURISDICTION OF THE NAVY DEPARTMENT.

Section 12 of the act of July 1, 1902 (32 Stat., 691, 695), which reserved to the United States in the Philippine Islands "such land or other property as shall be designated by the President of the United States for military and other reservations," does not confer upon him the power to withdraw the reservation completely from the local jurisdiction and place it under the jurisdiction of the Navy Department, thereby erecting a new and independent authority for all purposes of civil government.

Section 12 simply grants and reserves property; it does not confer governmental jurisdiction.

DEPARTMENT OF JUSTICE,
December 10, 1906.

SIR: I have the honor to respond to your request of October 20 for an opinion respecting the jurisdiction over the Subig Naval Reservation, Philippine Islands. The situation is as follows:

Under an Executive order dated November 26, 1902, a large body of lands and coastal and other waters in and along the provinces of Zambales and Bataan, island of Luzon, was "reserved for naval purposes, and *said reservation and all lands included within said boundaries*" were "*placed under the governance and control* of the Navy Department." Proper control and sanitation demand, in the opinion of the naval authorities, that the entire reservation should be completely under the jurisdiction of the Navy Department. Accordingly, steps have been taken to acquire for the United States all titles to private property in the village of Olongapo and elsewhere in the reservation. There are still some private lands not yet acquired or actually used for naval purposes.

Your question is, "To what extent the Navy Department has jurisdiction over persons and property within the limits of said reservation, and whether it is of such character and extent as to exclude the civil powers of the Philippine government and all citizens of said government residing within said reservation, such as the imposition of taxes, the management and disposition of real and personal property, the running of civil writs, the obtaining of wood for domestic

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purposes, and in general the exercise of such civil rights as do not interfere with the naval uses of the reservation."

The power to control and dispose of the public lands rests absolutely in Congress (Constitution, Art. IV, sec. 3, cl. 2; *United States* v. *Fitzpatrick*, 15 Pet., 407, 421; *Jourdan* v. *Barrett*, 4 How., 168, 184; *Gibson* v. *Chouteau*, 13 Wall., 92, 99). The power of the President to reserve public lands for public purposes is established, whether he acts on precedent authority from Congress, or his action is afterwards approved (*Wilcox* v. *Jackson*, 13 Pet., 498, 512; *Grisar* v. *McDowell*, 6 Wall., 363, 381; *Forty-three Cases of Brandy*, 14 Fed. Rep., 539; 7 Op., 571, 574; 12 Op., 379, 381; 14 Op., 181; 17 Op., 258). Here the authority was precedent, although inferential rather than affirmative (sec. 12, act July 1, 1902, 32 Stat., 695, *infra*).

The first question is whether the President intended to confer upon the Navy Department the power to maintain a distinct and complete government over the reservation, independent of the local authority. The phrase in the order on which this question hinges is "governance and control." Other similar orders of reservation contain equivalent language. In some cases the purpose only is stated: "For the use of the Marine-Hospital Service;" "for custom-house purposes" (Proc. June 30, 1903, 33 Stat., 2315, 2316); in some cases the single word "control" is used—the reservation to be under the *control* of the particular administrative service (Ex. Order January 9, 1904, G. O., War Dept., No. 14, 1904); but in other cases the language is similar to this, "under the jurisdiction and control," as in the instance of the Culebra naval station (G. O., 75, Navy Department, December 18, 1901).

The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand. The police power of the Government over lands set apart for its purposes, wherever situated, is essentially untrammeled. The extent to which the Government may go in the exercise of this power is measured by the exigencies of the particular case (*Caufield* v. *United States*, 167 U. S., 518, 525, 526). It is "an uncontrovertible principle

that the Government of the United States may, by means of physical force exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it" (*Ex parte Siebold*, 100 U. S., 371, 395; *In re Neagle*, 135 U. S., 1; *In re Debs*, 158 U. S., 564; and see *Ohio* v. *Thomas*, 173 U. S., 276). The military control up to the limit of the military necessities would be paramount; but such a charter of government as is deduced here from the President's language has not attached to any other order of military reservation, although couched in similar terms.

The conclusion, then, is natural that the intention of the President by his language was, as usual, to commit to the particular Department the administration of the property for the public use, without contemplating any separate establishment of municipal government. Such executive control would be generally adequate for the protection and objects of government even if individuals not in the government service were residing on the reservation and there were embraced within its exterior boundaries parcels of property in private ownership and municipalities of the local government. These would exist and exercise their functions and enjoy their rights, subject to the paramount Federal control. So that, practically, the national demands of the situation might be satisfied without granting the extreme claim advanced.

But your question squarely presents this claim. Assuming, then, that the President's intention was to confer upon the Navy Department a complete autonomous authority, to the exclusion of the local government and laws, the question is whether he was empowered.

In regard to a military reservation in a State, it is settled that no other legislative power than that of Congress can be exercised over lands purchased by the United States, with the consent of the State, for the public purposes enumerated in the Constitution (Art. I, sec. 8, cl. 17). But where exclusive jurisdiction is not reserved before the admission of the State, or ceded afterwards, the legislative power of the State will be as full and complete as over any other place within her limits, except that the Federal instrumentalities are exempt from State control. The ordinary municipal

laws of the State continue in force on the reservation, unless inconsistent with the laws of the United States or until changed by Congress (*Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S., 525; *Chicago, Rock Island and Pacific R. R. Co.* v. *McGlinn*, id., 542, and cases cited; 7 Op., 571, *ut supra*).

In a Territory this precise constitutional question affecting a State does not arise; the authority of Congress is altogether paramount. Yet it has been held not only that the laws of the United States apply to military reservations, but that "a territorial statute is operative upon a military reservation within the Territory so long as it does not conflict with the laws of the United States or with the military administration and legitimate operations of the Government" (Op. J. A. G., par. 2437, 2439; *Reynolds* v. *People*, 1 Colo., 181; *Territory* v. *Burgess*, 8 Mont., 57; *Scott* v. *United States*, 1 Wyo., 40; cf. Articles of War for the Army, Rev. Stat., sec. 1342, art. 58, 59). The articles for the government of the Navy (R. S., sec. 1624) do not expressly recognize any local civil jurisdiction, although article 6 does, by inference, respecting murder committed within the territorial jurisdiction of the United States. This distinction between the Army and the Navy is probably for the obvious reason that the Navy articles of war contemplate chiefly conditions on the high seas and not on land.

Now, both in a State and an organized Territory there is a Federal jurisdiction precisely marked out and Federal courts (i. e., either courts of the United States or the "Federal side" of territorial courts) competent for the settlement of every controversy, civil and criminal, which is not properly cognizable in the local tribunals and under local laws—that is, there is Federal "jurisdiction over all offences against the laws of the United States * * * and in all civil cases" within the national field as marked out by statute (e. g., secs. 563, 629, 5339, 5356, Rev. Stats.; sec. 9, act of May 2, 1890, 26 Stat., 81, 85; sec. 34, act of April 12, 1900, 31 Stat., 77, 84; c. f. Bowman and Tucker Acts, March 3, 1883, 22 Stat., 485; March 3, 1887, 24 Stat., 505). The present instance, however, is peculiar in that the Government, although resting on Federal authority, is wholly local. There are no courts of the United States and no territorial courts

in the strict sense of the term. The executive and judicial system is based upon alien originals and a foreign jurisprudence, and is largely administered, in the smaller municipal sub-divisions at least, by officials selected from the native inhabitants.

These are the general principles and the peculiar local conditions affecting the inquiry, and I now proceed to examine the particuliar doctrines and laws which seem to be controlling. The real question is, Which branch of the Federal authority, the Philippine government or the Navy Department, shall exercise the municipal jurisdiction claimed, both executive and judicial, on the reservation, over property not owned by the United States and persons not in its military service? I am not called upon by your query to consider whether, indeed, even persons in its reservation service may not be amenable to the local law and process in respect of ordinary offenses and liabilities and under the ordinary conditions of a time of peace. I have cited, *ante*, some of the statutes and authorities bearing upon this question.

The United States acquired the Philippine territory under the cession from Spain, and possesses both the rights of a proprietor and political dominion and sovereignty. Up to the date of the ratification of the treaty with Spain, the Executive government under the war power was supreme. Since that date the Executive has administered the government through military and civil agencies, and in particular by means of the Philippine Commission, upon whom the authority to legislate was specifically conferred (Instructions of April 7, 1900). Accordingly the Commission have established a complete civil government and enacted a large body of laws, and this government, both on the executive and judicial side, is in full operation throughout the islands except in a few localities, and embraces the territory now in question. This Executive government was recognized by Congress and broadly sustained in the "Spooner amendment" of March 2, 1901 (31 Stat., 910); and the Supreme Court, in a case testing the validity of one of the Commission's municipal laws, has sustained the competence of the government under the Commission and the validity of its laws (*Dorr* v. *United States*, 195 U. S., 138, 143, 153).

By the act of July 1, 1902 (32 Stat., 691), enacted to provide a civil government for the Philippine Islands, Congress confirmed the precedent acts of the Executive in the Philippines and conferred authority for the future (secs. 1–11). Section 12 placed all property and rights acquired from Spain under the control of the island government for the benefit of its inhabitants, "except such land or other property as shall be designated by the President of the United States for military and other reservations of the Government of the United States." The remainder of the act deals with the disposal of public lands and other matters not necessary to specify here.

Congress has thus acted fully and deliberately. The local government is now the instrument and agency of the legislature rather than of the Executive, although the entire administration is practically committed to the Executive, and the local government is treated as a branch of the Executive, directed by and responsible to the President in the first instance. In other words, Congress enacts the law or ratifies it, for the President to execute.

The Philippine Commission, in pursuance of its authority thus confirmed by Congress, enacted a law undertaking to deal with military reservations of the United States in the Philippines, by which it was provided (act No. 530, November 24, 1902; 2 Pub. Laws Phil. Com., 157) that no license for the sale of liquor on a military reservation shall be granted; that the military authorities shall have the right to eject trespassers from a reservation and to suppress open breaches of the peace and abate nuisances; that no branch of the civil government and no civilian residents shall interfere with the military administration of a reservation; that the personal property of persons employed in the military service used by them incident to that service shall be exempt from taxation; that mining claims shall not be located on military reservations; that illegal timber cutting on military reservations shall be punished; that the arrest of an officer, soldier, or civilian employee on a reservation must be made by a warrant in due form served upon the commanding officer; and (sec. 8) that all laws or parts of laws in force in the Philippine Islands, not inconsistent with

military use of any public lands reserved by the President for military purposes, shall be in full force and effect over said lands.

This act shows, indeed, a definite assertion of jurisdiction by the island government, but also a scrupulous intention to support the national rights and aid the reservation purposes. Now Congress has not disapproved or annulled this act of the Commission under section 86 of the act of July 1, 1902, which directed that all laws passed by the Philippine Government should be reported to Congress, and reserved the power to annul the same. The relation of Congress to all territorial legislation is similar (e. g., organic act, Oregon, 9 Stat., 323, 326; Utah, id., 453, 455; New Mexico, id., 446, 449; Washington, 10 Stat., 172, 175), and thus it may be said that the exercise of local jurisdiction for ordinary municipal purposes over a reservation in a territory is valid until and unless disapproved by Congress.

The above enactment of the Commission has been construed by the attorney-general of the Philippines (opinion of December 2, 1905; Of. Gaz., vol. 4, No. 5, p. 61). He affirms his previous view that the Philippine Commission unquestionably has authority to enact general laws extending over the military and naval reservations in the Philippine Islands (1 Op. A. G. Phil. Islands, 326; id., 332). One of these opinions referred to the Mariveles Reservation, respecting which G. O., 145 of 1902, Division of the Philippines, provided that "in order to preserve to the native and other inhabitants * * * trial by civil courts * * * it is announced * * * that the courts of first instance * * * still remain, under the changed status, vested with full power and jurisdiction for the trial of all cases arising between the inhabitants and other persons living on these reservations, excepting those connected with the military service."

The present case is not like that of Guam, where a complete government has been instituted and conducted by the Navy Department through an officer of the Navy appointed as governor by the Secretary and commissioned by the President under an order of President McKinley, which provides that "the island of Guam, in the Ladrones, is hereby placed under the control of the Department of the

Navy. The Secretary of the Navy will take such steps as may be necessary to establish the authority of the United States and to give it the necessary protection and government."

This order was dated December 23, 1898, and of course was an exercise of the war power, and the executive government thus established seems to have survived and continued since the ratification of the treaty, with the silent acquiescence of Congress, in accordance with the doctrine that a temporary and provisional government of this nature continues *ex necessitate rei* until further action by Congress (*Dooley* v. *United States*, 182 U. S., 222, citing *Cross* v. *Harrison*, 16 How, 164). The Guam government did not grow out of a military reservation, but was a military government of the entire island in consequences of occupation and conquest from Spain. Manifestly that instance is not a precedent here.

Further, section 12 of the act of 1902 simply grants and reserves *property;* it does not confer governmental jurisdiction. It deals with property belonging to the government; but does not grant the power to exercise the functions of government.

Upon this review, it is my opinion that it was not the intention of Congress by section 12 of the act of 1902 to confer upon the President the power to withdraw the reservation completely from the local jurisdiction and to erect a distinct and independent authority for all purposes of civil government. I do not think that the arguments *ab inconvenienti* which are advanced—the extent of the territory, the existence of local municipalities, the necessities of sanitation, the imperfections of native administration—can be heard to vary the rules of construction and enlarge the authority. If the arguments of convenience are, however, vital and controlling, they should be addressed to Congress in order to obtain specific addition to the grant of power.

I have the honor, therefore, to advise you that the jurisdiction of the Navy Department over the Subig Bay Naval Reservation is not of such character and extent as to exclude the civil powers of the Philippine government relating to the imposition of taxes, the management and disposition

of real and personal property, the running of ordinary civil writs, and, in general, the exercise of such civil rights as do not interfere with the naval uses of the reservation, including the provisions of the Philippine law punishing illegal timber cutting on military reservations, and requiring a warrant for the arrest of an officer, soldier, or civilian employee on a reservation to be served on the commanding officer. I do not understand the exact bearing or scope of the clause in your inquiry as to "obtaining of wood for domestic purposes;" but you will observe that by the opinion of the Attorney-General addressed to you dated October 10, you were advised that the Philippine government can not extend its forestry laws to the military reservations on those islands, and, referring especially to section 18 of the Philippine government act of July 1, 1902, and the proviso thereof that said government may issue licenses to cut timber on reserved or unreserved public lands in said islands, that "military and other reservations of the Government of the United States" are not embraced within the general phrase "reserved or unreserved public lands."

Very respectfully,

HENRY M. HOYT,
Solicitor-General.

Approved:
W. H. MOODY.

The SECRETARY OF WAR.

Mau

772), you are limited in the erection of the public building at Albuquerque, N. Mex., to providing accommodations for the post-office only, or whether you are also authorized to make provision for other governmental offices.

The legislation referred to is as follows:

Section 5 of the act of 1902 provides (p. 320):

"That the Secretary of the Treasury be, and he is hereby, authorized and directed to acquire by purchase, condemnation, or otherwise, a suitable site for the United States post-office and other governmental offices in each of the cities enumerated in this section, within its respective limit of cost hereby fixed:

* * * * *

"United States post-office at Albuquerque, New Mexico, ten thousand dollars."

Section 6 of the act of 1906 provides (p. 776):

"That the Secretary of the Treasury be, and he is hereby, authorized to contract for the erection and completion of a suitable building, including fireproof vaults, heating and ventilating apparatus, and approaches, complete, for the use and accommodation of the United States post-office and other governmental offices upon ground now owned by the United States in each of the following cities, respectively, within its respective limit of cost hereby fixed:

* * * * *

"United States post-office at Albuquerque, New Mexico, one hundred thousand dollars."

It is a rule of statutory interpretation that it is to be assumed that words and phrases are used in their technical meaning, if they have acquired one, because, if they have a definite meaning, it is to be supposed that this meaning was understood by the legislative branch of the Government when the law was enacted. (Endlich on Interpretation of Statutes, p. 4, and *Brocket* v. *The Ohio and Pennsylvania Railroad*, 14 Pa. St. Rep., 241.)

The term "post-office" has a definite technical meaning, which should not be extended, unless the act under consideration clearly shows that a broader meaning was intended by Congress.

A perusal of section 5 of the act of 1902 shows that the Secretary of the Treasury was thereby authorized to ac-

quire sites for public buildings in a number of cities throughout the country. In each case the purposes for which the site was to be acquired were specified, e. g., a "United States post-office and court-house at Pierre, South Dakota; United States post-office and custom house at Portsmouth, Virginia; United States post-office and land office at Natchitoches, Louisiana." For Albuquerque, a United States post-office only is provided.

True, the second proviso under section 5, of the act of 1902, states "that in acquiring sites under this section the Secretary of the Treasury shall take into consideration the present needs of the Government and the future growth of the cities enumerated, respectively; and in no case shall the Secretary of the Treasury acquire a site unless the dimensions thereof are of sufficient size for a building that will accommodate all the governmental offices now located or likely to be located in said cities, respectively." There is nothing in this, however, indicating an intention on the part of Congress to do more than secure enough land for the erection of a public building which should, at some future time, accommodate all governmental offices, if the necessity arose.

Turning to section 6, of the act of 1906, it is apparent that Congress intended to set forth specifically the purposes for which the buildings to be erected at the cities named in the bill were to be used, e. g., "United States post-office, court-house and other governmental offices at San Juan, Porto Rico; United States post-office and custom-house at Quincy, Massachusetts; United States post-office and court-house at Valdosta, Georgia," etc. For the second time, at Albuquerque, provision is made only for a post-office.

If Congress had intended to provide rooms for court or other governmental purposes, it would have been clearly indicated, as was done in the case of buildings to be erected elsewhere.

I am therefore of opinion that in erecting the public building at Albuquerque, N. Mex., you are authorized under existing legislation only to provide accommodations for the United States post-office.

Respectfully,

W. H. MOODY.

The SECRETARY OF THE TREASURY.

SUBIG BAY NAVAL RESERVATION—JURISDICTION OF THE NAVY DEPARTMENT.

Section 12 of the act of July 1, 1902 (32 Stat., 691, 695), which reserved to the United States in the Philippine Islands "such land or other property as shall be designated by the President of the United States for military and other reservations," does not confer upon him the power to withdraw the reservation completely from the local jurisdiction and place it under the jurisdiction of the Navy Department, thereby erecting a new and independent authority for all purposes of civil government.

Section 12 simply grants and reserves property; it does not confer governmental jurisdiction.

DEPARTMENT OF JUSTICE,
December 10, 1906.

SIR: I have the honor to respond to your request of October 20 for an opinion respecting the jurisdiction over the Subig Naval Reservation, Philippine Islands. The situation is as follows:

Under an Executive order dated November 26, 1902, a large body of lands and coastal and other waters in and along the provinces of Zambales and Bataan, island of Luzon, was "reserved for naval purposes, and *said reservation and all lands included within said boundaries*" were "*placed under the governance and control* of the Navy Department." Proper control and sanitation demand, in the opinion of the naval authorities, that the entire reservation should be completely under the jurisdiction of the Navy Department. Accordingly, steps have been taken to acquire for the United States all titles to private property in the village of Olongapo and elsewhere in the reservation. There are still some private lands not yet acquired or actually used for naval purposes.

Your question is, "To what extent the Navy Department has jurisdiction over persons and property within the limits of said reservation, and whether it is of such character and extent as to exclude the civil powers of the Philippine government and all citizens of said government residing within said reservation, such as the imposition of taxes, the management and disposition of real and personal property, the running of civil writs, the obtaining of wood for domestic

purposes, and in general the exercise of such civil rights as do not interfere with the naval uses of the reservation."

The power to control and dispose of the public lands rests absolutely in Congress (Constitution, Art. IV, sec. 3, cl. 2; *United States* v. *Fitzpatrick*, 15 Pet., 407, 421; *Jourdan* v. *Barrett*, 4 How., 168, 184; *Gibson* v. *Chouteau*, 13 Wall., 92, 99). The power of the President to reserve public lands for public purposes is established, whether he acts on precedent authority from Congress, or his action is afterwards approved (*Wilcox* v. *Jackson*, 13 Pet., 498, 512; *Grisar* v. *McDowell*, 6 Wall., 363, 381; *Forty-three Cases of Brandy*, 14 Fed. Rep., 539; 7 Op., 571, 574; 12 Op., 379, 381; 14 Op., 181; 17 Op., 258). Here the authority was precedent, although inferential rather than affirmative (sec. 12, act July 1, 1902, 32 Stat., 695, *infra*).

The first question is whether the President intended to confer upon the Navy Department the power to maintain a distinct and complete government over the reservation, independent of the local authority. The phrase in the order on which this question hinges is "governance and control." Other similar orders of reservation contain equivalent language. In some cases the purpose only is stated: "For the use of the Marine-Hospital Service;" "for custom-house purposes" (Proc. June 30, 1903, 33 Stat., 2315, 2316); in some cases the single word "control" is used—the reservation to be under the *control* of the particular administrative service (Ex. Order January 9, 1904, G. O., War Dept., No. 14, 1904); but in other cases the language is similar to this, "under the jurisdiction and control," as in the instance of the Culebra naval station (G. O., 75, Navy Department, December 18, 1901).

The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand. The police power of the Government over lands set apart for its purposes, wherever situated, is essentially untrammeled. The extent to which the Government may go in the exercise of this power is measured by the exigencies of the particular case (*Camfield* v. *United States*, 167 U. S., 518, 525, 526). It is "an uncontrovertible principle

that the Government of the United States may, by means of physical force exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it" (*Ex parte Siebold*, 100 U. S., 371, 395; *In re Neagle*, 135 U. S., 1; *In re Debs*, 158 U. S., 564; and see *Ohio* v. *Thomas*, 173 U. S., 276). The military control up to the limit of the military necessities would be paramount; but such a charter of government as is deduced here from the President's language has not attached to any other order of military reservation, although couched in similar terms.

The conclusion, then, is natural that the intention of the President by his language was, as usual, to commit to the particular Department the administration of the property for the public use, without contemplating any separate establishment of municipal government. Such executive control would be generally adequate for the protection and objects of government even if individuals not in the government service were residing on the reservation and there were embraced within its exterior boundaries parcels of property in private ownership and municipalities of the local government. These would exist and exercise their functions and enjoy their rights, subject to the paramount Federal control. So that, practically, the national demands of the situation might be satisfied without granting the extreme claim advanced.

But your question squarely presents this claim. Assuming, then, that the President's intention was to confer upon the Navy Department a complete autonomous authority, to the exclusion of the local government and laws, the question is whether he was empowered.

In regard to a military reservation in a State, it is settled that no other legislative power than that of Congress can be exercised over lands purchased by the United States, with the consent of the State, for the public purposes enumerated in the Constitution (Art. I, sec. 8, cl. 17). But where exclusive jurisdiction is not reserved before the admission of the State, or ceded afterwards, the legislative power of the State will be as full and complete as over any other place within her limits, except that the Federal instrumentalities are exempt from State control. The ordinary municipal

laws of the State continue in force on the reservation, unless inconsistent with the laws of the United States or until changed by Congress (*Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S., 525; *Chicago, Rock Island and Pacific R. R. Co.* v. *McGlinn*, id., 542, and cases cited; 7 Op., 571, *ut supra*).

In a Territory this precise constitutional question affecting a State does not arise; the authority of Congress is altogether paramount. Yet it has been held not only that the laws of the United States apply to military reservations, but that "a territorial statute is operative upon a military reservation within the Territory so long as it does not conflict with the laws of the United States or with the military administration and legitimate operations of the Government" (Op. J. A. G., par. 2437, 2439; *Reynolds* v. *People*, 1 Colo., 181; *Territory* v. *Burgess*, 8 Mont., 57; *Scott* v. *United States*, 1 Wyo., 40; cf. Articles of War for the Army, Rev. Stat., sec. 1342, art. 58, 59). The articles for the government of the Navy (R. S., sec. 1624) do not expressly recognize any local civil jurisdiction, although article 6 does, by inference, respecting murder committed within the territorial jurisdiction of the United States. This distinction between the Army and the Navy is probably for the obvious reason that the Navy articles of war contemplate chiefly conditions on the high seas and not on land.

Now, both in a State and an organized Territory there is a Federal jurisdiction precisely marked out and Federal courts (i. e., either courts of the United States or the "Federal side" of territorial courts) competent for the settlement of every controversy, civil and criminal, which is not properly cognizable in the local tribunals and under local laws—that is, there is Federal "jurisdiction over all offences against the laws of the United States * * * and in all civil cases" within the national field as marked out by statute (e. g., secs. 563, 629, 5339, 5356, Rev. Stats.; sec. 9, act of May 2, 1890, 26 Stat., 81, 85; sec. 34, act of April 12, 1900, 31 Stat., 77, 84; c. f. Bowman and Tucker Acts, March 3, 1883, 22 Stat., 485; March 3, 1887, 24 Stat., 505). The present instance, however, is peculiar in that the Government, although resting on Federal authority, is wholly local. There are no courts of the United States and no territorial courts

in the strict sense of the term. The executive and judicial system is based upon alien originals and a foreign jurisprudence, and is largely administered, in the smaller municipal sub-divisions at least, by officials selected from the native inhabitants.

These are the general principles and the peculiar local conditions affecting the inquiry, and I now proceed to examine the particuliar doctrines and laws which seem to be controlling. The real question is, Which branch of the Federal authority, the Philippine government or the Navy Department, shall exercise the municipal jurisdiction claimed, both executive and judicial, on the reservation, over property not owned by the United States and persons not in its military service? I am not called upon by your query to consider whether, indeed, even persons in its reservation service may not be amenable to the local law and process in respect of ordinary offenses and liabilities and under the ordinary conditions of a time of peace. I have cited, *ante*, some of the statutes and authorities bearing upon this question.

The United States acquired the Philippine territory under the cession from Spain, and possesses both the rights of a proprietor and political dominion and sovereignty. Up to the date of the ratification of the treaty with Spain, the Executive government under the war power was supreme. Since that date the Executive has administered the government through military and civil agencies, and in particular by means of the Philippine Commission, upon whom the authority to legislate was specifically conferred (Instructions of April 7, 1900). Accordingly the Commission have established a complete civil government and enacted a large body of laws, and this government, both on the executive and judicial side, is in full operation throughout the islands except in a few localities, and embraces the territory now in question. This Executive government was recognized by Congress and broadly sustained in the "Spooner amendment" of March 2, 1901 (31 Stat., 910); and the Supreme Court, in a case testing the validity of one of the Commission's municipal laws, has sustained the competence of the government under the Commission and the validity of its laws (*Dorr* v. *United States*, 195 U. S., 138, 143, 153).

By the act of July 1, 1902 (32 Stat., 691), enacted to provide a civil government for the Philippine Islands, Congress confirmed the precedent acts of the Executive in the Philippines and conferred authority for the future (secs. 1–11). Section 12 placed all property and rights acquired from Spain under the control of the island government for the benefit of its inhabitants, "except such land or other property as shall be designated by the President of the United States for military and other reservations of the Government of the United States." The remainder of the act deals with the disposal of public lands and other matters not necessary to specify here.

Congress has thus acted fully and deliberately. The local government is now the instrument and agency of the legislature rather than of the Executive, although the entire administration is practically committed to the Executive, and the local government is treated as a branch of the Executive, directed by and responsible to the President in the first instance. In other words, Congress enacts the law or ratifies it, for the President to execute.

The Philippine Commission, in pursuance of its authority thus confirmed by Congress, enacted a law undertaking to deal with military reservations of the United States in the Philippines, by which it was provided (act No. 530, November 24, 1902; 2 Pub. Laws Phil. Com., 157) that no license for the sale of liquor on a military reservation shall be granted; that the military authorities shall have the right to eject trespassers from a reservation and to suppress open breaches of the peace and abate nuisances; that no branch of the civil government and no civilian residents shall interfere with the military administration of a reservation; that the personal property of persons employed in the military service used by them incident to that service shall be exempt from taxation; that mining claims shall not be located on military reservations; that illegal timber cutting on military reservations shall be punished; that the arrest of an officer, soldier, or civilian employee on a reservation must be made by a warrant in due form served upon the commanding officer; and (sec. 8) that all laws or parts of laws in force in the Philippine Islands, not inconsistent with

military use of any public lands reserved by the President for military purposes, shall be in full force and effect over said lands.

This act shows, indeed, a definite assertion of jurisdiction by the island government, but also a scrupulous intention to support the national rights and aid the reservation purposes. Now Congress has not disapproved or annulled this act of the Commission under section 86 of the act of July 1, 1902, which directed that all laws passed by the Philippine Government should be reported to Congress, and reserved the power to annul the same. The relation of Congress to all territorial legislation is similar (e. g., organic act, Oregon, 9 Stat., 323, 326; Utah, id., 453, 455; New Mexico, id., 446, 449; Washington, 10 Stat., 172, 175), and thus it may be said that the exercise of local jurisdiction for ordinary municipal purposes over a reservation in a territory is valid until and unless disapproved by Congress.

The above enactment of the Commission has been construed by the attorney-general of the Philippines (opinion of December 2, 1905; Of. Gaz., vol. 4, No. 5, p. 61). He affirms his previous view that the Philippine Commission unquestionably has authority to enact general laws extending over the military and naval reservations in the Philippine Islands (1 Op. A. G. Phil. Islands, 326; id., 332). One of these opinions referred to the Mariveles Reservation, respecting which G. O., 145 of 1902, Division of the Philippines, provided that "in order to preserve to the native and other inhabitants * * * trial by civil courts * * * it is announced * * * that the courts of first instance * * * still remain, under the changed status, vested with full power and jurisdiction for the trial of all cases arising between the inhabitants and other persons living on these reservations, excepting those connected with the military service."

The present case is not like that of Guam, where a complete government has been instituted and conducted by the Navy Department through an officer of the Navy appointed as governor by the Secretary and commissioned by the President under an order of President McKinley, which provides that "the island of Guam, in the Ladrones, is hereby placed under the control of the Department of the

Navy. The Secretary of the Navy will take such steps as may be necessary to establish the authority of the United States and to give it the necessary protection and government."

This order was dated December 23, 1898, and of course was an exercise of the war power, and the executive government thus established seems to have survived and continued since the ratification of the treaty, with the silent acquiescence of Congress, in accordance with the doctrine that a temporary and provisional government of this nature continues *ex necessitate rei* until further action by Congress (*Dooley* v. *United States*, 182 U. S., 222, citing *Cross* v. *Harrison*, 16 How, 164). The Guam government did not grow out of a military reservation, but was a military government of the entire island in consequences of occupation and conquest from Spain. Manifestly that instance is not a precedent here.

Further, section 12 of the act of 1902 simply grants and reserves *property;* it does not confer governmental jurisdiction. It deals with property belonging to the government; but does not grant the power to exercise the functions of government.

Upon this review, it is my opinion that it was not the intention of Congress by section 12 of the act of 1902 to confer upon the President the power to withdraw the reservation completely from the local jurisdiction and to erect a distinct and independent authority for all purposes of civil government. I do not think that the arguments *ab inconvenienti* which are advanced—the extent of the territory, the existence of local municipalities, the necessities of sanitation, the imperfections of native administration—can be heard to vary the rules of construction and enlarge the authority. If the arguments of convenience are, however, vital and controlling, they should be addressed to Congress in order to obtain specific addition to the grant of power.

I have the honor, therefore, to advise you that the jurisdiction of the Navy Department over the Subig Bay Naval Reservation is not of such character and extent as to exclude the civil powers of the Philippine government relating to the imposition of taxes, the management and disposition

of real and personal property, the running of ordinary civil writs, and, in general, the exercise of such civil rights as do not interfere with the naval uses of the reservation, including the provisions of the Philippine law punishing illegal timber cutting on military reservations, and requiring a warrant for the arrest of an officer, soldier, or civilian employee on a reservation to be served on the commanding officer. I do not understand the exact bearing or scope of the clause in your inquiry as to "obtaining of wood for domestic purposes;" but you will observe that by the opinion of the Attorney-General addressed to you dated October 10, you were advised that the Philippine government can not extend its forestry laws to the military reservations on those islands, and, referring especially to section 18 of the Philippine government act of July 1, 1902, and the proviso thereof that said government may issue licenses to cut timber on reserved or unreserved public lands in said islands, that "military and other reservations of the Government of the United States" are not embraced within the general phrase "reserved or unreserved public lands."

Very respectfully,

HENRY M. HOYT,
Solicitor-General.

Approved:
W. H. MOODY.

The SECRETARY OF WAR.

OPINIONS

OF

HON. CHARLES J. BONAPARTE, OF MARYLAND.

APPOINTED DECEMBER 17, 1906.

FREE REGISTRATION OF OFFICIAL MAIL—PENSION AGENTS.

The words "official mail matter," contained in paragraph 4 of the act of July 2, 1886 (24 Stat., 122), which extends the provisions of section 3 of the act of July 5, 1884 (23 Stat., 158) relating to the free registration of official mail to pension agents, means *all* matter passing through the mails of an *official* as distinguished from a personal or private character.

There is nothing to indicate an intention on the part of Congress to exclude pension agents from the provisions of section 3 of the act of 1884 (23 Stat., 158), allowing the free registration of official mail matter, and the delivery of part-paid letters or packets addressed to them, which have reference to official business.

Opinion of June 13, 1906 (25 Op., 617), concurred in.

DEPARTMENT OF JUSTICE,
January 3, 1907.

SIR: I have the honor to acknowledge receipt of your letter of October 19, with inclosures, asking my opinion of the effect of paragraph 4 of the act of July 2, 1886 (24 Stat., 122).

In order to understand the effect of this legislation it will be necessary to consider generally the statutes relating to the transmission of official mail matter.

The first act passed relating to this subject was that of March 3, 1877 (19 Stat., 335), section 5 of which provides:

"That it shall be lawful to transmit through the mail, free of postage, any letters, packages, or other matters relating exclusively to the business of the Government of the United

States: *Provided*, That every such letter or package to entitle it to pass free shall bear over the words 'Official Business' an indorsement showing also the name of the Department, and, if from a bureau or office, the names of the Department and bureau or office, as the case may be, whence transmitted." * * *

The remainder of this section provides for penalties for the illegal use of official envelopes; and section 6 merely sets out the manner in which the necessary envelopes shall be furnished to the various Departments.

Section 29 of the act of March 3, 1879 (20 Stat., 362), extends the privilege of free transmission of official mail matter to all Government officers, whether located at Washington or elsewhere. It is also expressly provided that this act shall not extend or apply to pension agents.

The act of July 5, 1884 (23 Stat., 158), reenacts the two laws just mentioned, excluding, however, Members of Congress from its provisions, and contains the following proviso in section 3:

* * * "That any letter or packet to be registered by either of the Executive Departments or Bureaus thereof, or by the Agricultural Department, or by the Public Printer, may be registered without the payment of any registry fee; and any part-paid letter or packet addressed to either of said Departments or Bureaus may be delivered free." * * *

And it is again provided that the act shall not extend or apply to pension agents.

The last statute we have to consider is the act of July 2, 1886 (24 Stat., 122), which states that the provisions of section 3 of the act of July 5, 1884, just referred to, "are hereby extended and made applicable to all official mail matter of agents for the payment of pensions."

The last-mentioned statute was considered by my immediate predecessor in an opinion rendered on June 13, last past (25 Op., 617), and by the Comptroller of the Treasury in a letter to the Secretary of the Interior bearing date April 17, 1906 (12 Comp. Dec., 617). Both of these officers reached the conclusion that so much of the statute as referred to free registration applied to the "official mail matter" of pension agents. In these opinions I fully concur. I find nothing in the language of this statute which

limits its application to any particular clause of the section to which it specifically refers.

Some discussion has arisen as to the meaning of "official mail matter." I find nothing to show or suggest that the Congress meant by these words anything different from what it said, i. e., *all* matter passing through the mails of an *official* (as distinguished from a *personal* or *private*) character; and consequently there is nothing to indicate an intention on the part of the Congress to exclude pension agents from the provisions of section 3 of the act of 1884, *supra*, allowing the free registration of official mail matter and the delivery of part-paid letters or packets addressed to them, and which have reference to official business.

Respectfully,

CHARLES J. BONAPARTE.

The POSTMASTER-GENERAL.

DRY DOCK AT NEW YORK—CONSTRUCTION OF CONTRACT.

The contractor, and not the Government, is responsible, under his contract for the erection of a dry dock at the navy-yard at New York, for damages to the excavation and structural work there in progress, caused by water flowing from a concealed drain pipe, the existence of which neither the contractor nor the Government knew, and by a breakage in the rebuilt portion of a sewer which had been diverted around the head of the dry dock, caused, in large measure, by the ground support on the side next the dry dock having been weakened by the excavation, the contract expressly providing, among other things, that the contract price covered all contingencies of every kind; that the entire responsibility for the sufficiency of the shoring and protection of the excavation and various structures should rest upon the contractor; that he shall be responsible for any settlement or damage to the structures that may result directly or indirectly from his operation; and that he shall be responsible for the entire work and every part thereof until completion and acceptance.

DEPARTMENT OF JUSTICE,
January 9, 1907.

SIR: Your letter of December 31, 1906, submits for my consideration a question which has arisen under a contract between George B. Spearin and the Navy Department for the construction of a dry dock at the United States navy-yard, New York, N. Y., "as to whether the Government

or the contractor is responsible for the injuries that have resulted and are likely to result to the work in progress by leakage from a concealed drain pipe and a broken 6-foot sewer in the vicinity of the excavation for the dock." You inclose for my information a copy of the contract in question, together with correspondence bearing upon the subject; and you state that the contractor has been notified by the Navy Department that in its judgment responsibility for the damages rests on him, but that he has requested a rehearing, and that, upon further consideration, you are in some doubt whether the Government should not properly assume the expense of repairing the damages and of guarding against further injury anticipated in the near future.

From your letter and the papers transmitted it appears that the sewer referred to formerly intercepted the dock site; that it was diverted around the head of the dry dock under the terms of the contract; that the break occurred in the part of the sewer which was rebuilt in that new course, and was caused by pressure on the inside of the sewer during unusually heavy rains last August, the sewer not being of sufficient area to carry off all the water which then fell and not being sufficiently supported at the point where the crack occurred; that because of these conditions the contractor has suspended work, and now claims, not only that he is not responsible for the breaking of the sewer, but that he is entitled to reimbursement for the damages thus caused to his work and property.

In order to fix the responsibility in this matter it is necessary to make a careful examination of the contract between Mr. Spearin and the Navy Department. The instrument is dated February 7, 1905, and is for the construction of a dry dock at the navy-yard, New York, N. Y., to be completed within forty-two calendar months from the date of the contract, the contractor to furnish at his own risk and expense all labor, materials, temporary structures, etc., and to take all necessary and suitable precautions, during the progress and until completion of the work, to avoid or prevent accidents; and to save the United States from all claims against it by reason of any injury to person or property resulting from any accident which may occur during the prosecution of the work and in connection with it. By

paragraph 5 of the specifications accompanying and forming part of the contract, a United States civil engineer or other authorized representative is to have control and direction of the work, and all questions and disputes as to the details shall be decided by such officer subject to appeal to the Chief of the Bureau of Yards and Docks. There are provisions for extensions of time and for damages, in the form of daily deductions, for avoidable delays in completing the work within the time specified or the extensions allowed; and also for the annulment of the contract if from the progress made it shall appear that the work is not likely to be completed within the time allowed.

It is unnecessary to follow the details of the specifications as to materials to be used, workmanship, temporary works, construction (including, among other things, the diversion of the intercepting sewer), proposals, etc. But it is to be observed that the contract contains numerous provisions safeguarding the Government from claims for damages, and placing complete responsibility upon the contractor for all accidents, injuries, and contingencies of every kind. Paragraph 21 is as follows:

"The contractor shall be responsible for the entire work and every part thereof, until completion and final acceptance by the Chief of the Bureau of Yards and Docks, and for all tools, appliances, and property of every description used in connection therewith. * * * *Provided*, That the contractor shall specifically and distinctly assume all risks of damages or injury *from any cause* to property or persons used or employed on or in connection with the work, and of all damages or injury to any person or property, wherever located, resulting from any action or operation under the contract or in connection with the work, and undertakes and promises to protect and defend the United States against all claims on account of any such damage or injury."

It is also agreed that the Government and the contractor will labor to mutual advantage where their several works may touch upon or interfere with each other, and that in case of a necessary interference no claim for extra compensation shall arise, "the contract price covering all contingencies of every kind," except such changes in the contract as the United States may deem necessary and advisable to make (par. 30).

Again, under paragraph 149, requiring the removal of railroad tracks, sewers, and pipes on the dock site, the contractor "will be held responsible for and be required to repair all damages" to pipes and tracks by reason of the building of the new sewer; and in paragraph 152, relating to the shoring and protection of the excavation and various structures, while the method and plans for the same are subject to the approval of the civil engineer in charge, "the entire responsibility for its sufficiency shall rest upon the contractor, and he shall be liable for any settlement or damage" to the structures that may result, directly or indirectly, from his operations.

Thus, by the terms of the contract, the fullest measure of responsibility seems to rest upon the contractor for all possible accidents and injuries occurring in connection with his operations in the construction of the dry dock. The question as to his responsibility in the matter of the sewer depends upon whether the accident occurred in connection with these operations. It is alleged that the damage was caused, not only by the break in the sewer, but by the opening of the manholes, the sewer not being of sufficient area to carry off all the water which fell during a very heavy rain, and the internal pressure being so great as to lift the covers of the manholes and force the water up through the holes. This, as the civil engineer in charge explains in his letter of August 29, 1906, had sometimes happened with the original sewer during heavy downfalls of rain, a fact which the contractor asserts was not communicated to him by the Government authorities until after the failure of the sewer in August. But it is noted that never, until the new portion of the sewer was built, had any break in the sewer occurred; and the view of the engineer is that the break was directly caused by an insufficient quantity of earth over the sewer at that point, the ground having broken away from the inner side of the sewer and moved toward the excavation, leaving a portion of the sewer exposed on the side next the dock, and thus depriving it of the support necessary to such structures in order to resist the internal pressure. In this view, the engineer states, Mr. Spearin's representative has concurred and it appears to be inherently highly probable.

In view of the broad terms of the contract above cited relating to the contractor's responsibility, the undoubted fact that the break in the sewer occurred in the rebuilt portion and the very strong probability that it was a direct consequence of the contractor's operations in connection with his excavation work as decided by the engineer, I am of the opinion that he is responsible for the damage resulting from the breaking of the sewer, and that he should restore the sewer and deliver it in sound and proper condition to the Government, as is contemplated by the contract. And since it is impossible to separate the damages caused by the break from those resulting from the water forced through the manholes, and the latter can hardly be at all serious, I think Mr. Spearin must be considered responsible for the entire occurrence. As to his intimation that he ought to have been advised by the authorities at the dock of the previous overflows of the sewer through the manholes, I hold that it was his duty before undertaking the work to ascertain fully all the conditions connected therewith, including the facts connected with the existing sewer, in view of paragraph 271 of the specifications, which is as follows:

"Intending bidders are expected to examine the site of the proposed dry dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals."

In the matter of the leakage of the concealed 12-inch drain-pipe, you state that Mr. Spearin bases his claim for damages caused by the flowing of water through this drain, upon the ground that the drain was not shown on any of the plans of the site or its surroundings, and that neither he nor the Government authorities knew of its presence there. It seems sufficient, in this connection, to refer to paragraph 271, above set forth, and also to paragraph 35 of the specifications. The latter allows intending bidders the privilege of examining the site, and adds: "And they must satisfy themselves, by boring or otherwise, as to the nature and character of the soil, as the Government will not assume *any* risk or responsibility in connection therewith." Paragraph 271 has been already given.

From these provisions of the specifications, as well as

those already cited, it is clear the contractor is not entitled to any compensation or relief because the existence of the drain in question was unknown to him when he undertook the work.

Accordingly, I have the honor to answer your specific question by advising you that, in my opinion, the Government is not, and the contractor is, responsible, under the contract entered into with Mr. Spearin, for the damages caused by water flowing from the concealed drain-pipe and for the breaking of the sewer and the resulting damages to the excavation and the structural work in progress.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE NAVY.

SURVEYORS OF CUSTOMS—DISBURSEMENT OF PUBLIC MONEYS.

Surveyors of customs at ports where there are no collectors are not to be considered as collectors, and therefore within the provisions of section 3657, Revised Statutes, which requires collectors of customs to disburse all moneys that may be appropriated for the construction of custom-houses, court-houses, post-offices, etc.

Suggested, that authority for the designation of a surveyor of customs to act in that capacity, where there is no collector, would seem to exist under sections 255 and 3658, Revised Statutes, and for extra compensation, under section 3554, Revised Statutes.

DEPARTMENT OF JUSTICE,
January 15, 1907.

SIR: In your letter of December 20, 1906, you request my opinion whether "surveyors of customs at ports where there are no collectors are to be considered as collectors and therefore within the provision of the law requiring collectors of customs to disburse the moneys appropriated for the construction of custom-houses, court-houses, post-offices, and marine hospitals."

The provision referred to is section 3657, Revised Statutes, which reads:

"SEC. 3657. The collectors of customs in the several collection districts are required to act as disbursing agents for

the payment of all moneys that are or may hereafter be appropriated for the construction of custom-houses, court-houses, post-offices, and marine hospitals; with such compensation, not exceeding one-quarter of one per centum, as the Secretary of the Treasury may deem equitable and just."

As part of the case submitted, you say:

"Surveyors of customs of inland ports over which they preside are the principal customs officers at those ports and are not subordinate to any collector, and it has been the practice of the Department for a great many years to regard such surveyors as collectors of customs.

"These officers transact all the business of a collector at the ports where they are located, and are treated as collectors in all their dealings with the Department.

"It has also been the practice of the Department, for a great many years, in thus treating such surveyors as collectors to designate them under the provisions of section 3657 of the Revised Statutes as disbursing agents of funds appropriated for the erection of public buildings at the various ports over which they preside. In some cases such officers have been designated to make such disbursements under their bonds as surveyors or under separate bonds required of them as special disbursing agents, and they have been allowed the commission of three-eighths of 1 per cent of such disbursements, which the law allows to be paid to collectors of customs in certain cases."

My attention has been called to no statute imposing generally upon surveyors of customs at ports where a surveyor only is appointed all the duties of a collector of customs, and I am unable to find such a statute. Section 2623, Revised Statutes, provides that at ports to which a *collector* only is appointed, the collector shall solely execute the duties in which the cooperation of the naval officer is requisite, where a naval officer is appointed, and "shall also, as far as may be, perform all the duties prescribed for surveyors at ports where surveyors are authorized." But section 2628, which covers the case of ports where surveyors only are appointed, does not undertake to impose upon such surveyors all the duties of collectors. The only cases in

which a surveyor is required by law to perform all the duties of a collector are those of the disability or death of the collector, when there is no deputy collector or naval officer (sec. 2625) and when, in case of insurrection, it may be necessary for the President to cause duties to be collected at the port of delivery instead of the port of entry (sec. 5314).

This being so, I am unable to see any authority for holding that surveyors of customs at ports where there are no collectors are to be considered as collectors and therefore within the provision of section 3657, requiring collectors to disburse the moneys appropriated for the construction of custom houses, etc.

I may suggest, however, that authority for the designation of a surveyor of customs to act in the capacity above mentioned at a port where there is no collector would seem to exist, if not under section 3658, at least under section 255, Revised Statutes.

"SEC. 3658. Where there is no collector at the place or location of any public work specified in the preceding section, the Secretary of the Treasury may appoint a disbursing agent for the payment of all moneys appropriated for the construction of any such public work, with such compensation as he may deem equitable and just."

The act of July 31, 1894, section 2 (28 Stat., 205), providing that "no person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized by law," would preclude the appointment of surveyors under this section, where the annual compensation attached to their office amounts to the sum named. But section 255 seems to cover the case exactly.

"SECTION 255. The Secretary of the Treasury may designate any officer of the United States, who has given bonds for the faithful performance of his duties, to be disbursing agent for the payment of all moneys appropriated for the construction of public buildings authorized by law within the district of such officer."

The allowance of extra compensation for such service appears to be authorized by section 3654, Revised Statutes, as amended by the act of March 3, 1875, section 4 (18 Stat., 415).

"SEC. 3654. No extra compensation exceeding one-eighth of one per centum shall in any case be allowed or paid to any officer, person, or corporation for disbursing moneys appropriated to the construction of any public building."

The act of March 3, 1875, amended this provision so as to make it read three-eighths of 1 per centum instead of one-eighth.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

NAVAL OFFICERS—ADVANCEMENT ON RETIRED LIST.

The act of June 18, 1884 (23 Stat., 45), which provides for the nomination and appointment of Assistant Engineer John W. Saville, of the United States Navy, then on the retired list, to be a passed assistant engineer in the Navy and that he be placed on the retired list with the highest rate of retired pay of that grade, did not effect a new retirement nullifying the original retirement, but merely effected an advancement on the retired list, the effect of which was merely to advance him one grade on that list.

Mr. Saville is therefore debarred from advancement under the act of June 29, 1906 (34 Stat., 553, 554), which provides that the act shall not apply to any officer who received an advance of grade at or since the date of his retirement.

DEPARTMENT OF JUSTICE,
January 22, 1907.

SIR: Your letter of January 11, and the accompanying official indorsements, show that on April 3, 1885, John W. Saville, an assistant engineer in the Navy, then on the retired list, was commissioned a passed assistant engineer and placed on the retired list from June 19, 1884, under the authority of a special act of June 18, 1884 (23 Stat., 45), which provides:

"That the President of the United States be, and is hereby, authorized to nominate, and by and with the advice

and consent of the Senate, to appoint Assistant Engineer John W. Saville, of the United States Navy, a passed assistant engineer in the Navy, to date with his class on the active list; and that he be placed on the retired list of the Navy with the highest rate of retired pay of that grade, to date from and after the passage of this act."

You ask whether Mr. Saville is entitled to the benefits of the naval appropriation act of June 29, 1906 (34 Stat., 553, 554), which provides for the advancement one grade on the retired list, with certain limitations, of any officer of the Navy not above the grade of captain who served with credit during the civil war and who has heretofore been or may hereafter be retired on account of wounds or disability incident to the service, etc. Passed Assistant Engineer Saville falls within this category, and the doubt in the case arises because of the proviso to the act of June 29, 1906, which is as follows:

"*Provided*, That this Act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special Act of Congress."

It appears clear to me that Mr. Saville, being retired in 1871, as appears from the official record, the special act of 1884 for his benefit did not effect a new retirement nullifying the original retirement, but merely effected an advancement on the retired list in pursuance of the usual legislative method adopted for that purpose. The obvious intention, meaning, and effect of the act of 1884 simply was to advance Mr. Saville, already on the retired list, one grade on that list. As he thereby received an advance of grade since the date of his retirement, he is debarred from the benefits of the act of 1906 by the very terms of the proviso.

Accordingly I have the honor to answer your question in the negative.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE NAVY.

THE PRESIDENT—GOVERNMENT OF THE CANAL ZONE.

The President may now, directly or through persons appointed and employed by him to govern the Canal Zone and build the Panama Canal, adopt needed rules and regulations for the government of that Zone, and he has not lost the power to modify any of the rules and regulations established by the Canal Commission prior to the Fifty-eighth Congress.

Section 2 of the act of April 28, 1904 (33 Stat., 429), which provided that until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, "the power to make all rules and regulations necessary for the government of the Canal Zone * * * shall be vested in such person or persons and shall be exercised in such manner as the President shall direct," is to be considered as declaratory only of what would have been the rights and duties of the President if it had not been enacted.

The limitation of the effect of the provision to the Fifty-eighth Congress merely indicates that during the period of its own lawful existence, unless sooner modified, Congress intended that the powers of government which it might have lawfully exercised in the Canal Zone should be exercised by the President, or such officers or persons as he might designate.

Articles II and III of the treaty between the United States and the Republic of Panama (33 Stat., 2234), imposed upon the United States the obligations as well as the powers of a sovereign within the Canal Zone, including among these the obligation of providing a government for the territory in question.

In the absence of action by Congress distinctly denying that right, the President would have the power to administer the Canal Zone merely because control, with the incidents of sovereignty, over it was passed to the United States, and no other provision for its orderly government had been made.

This authority involves the right and power to modify or repeal any laws previously existing within that territory, whether originally enacted before or after its acquisition by the United States.

Laws governing a territory which has passed from one sovereign power to another continue in force after the authority which enacted them has ceased to exist, only by the consent of the succeeding authority to their continuing validity, implied from its failure to modify or repeal them.

As soon as the new government considers existing laws no longer appropriate to attain the ends of government, it has the inherent right to change or annul them, unless its authority in this respect has been curtailed.

DEPARTMENT OF JUSTICE,
January 30, 1907.

SIR: I have received your letter of the 21st instant, submitting for my opinion "the question whether by section 2 of the act of April 28, 1904, the President, as distinguished from the Isthmian Canal Commission, is prohibited from putting into effect by Executive order needed rules and regulations for the government of the Canal Zone, and, as a corollary thereto, whether he has lost the power to modify any rules and regulations established by the Isthmian Canal Commission prior to the expiration of the Fifty-eighth Congress."

To answer this question it is necessary to consider the section of the act mentioned in your letter immediately preceding the one to which you especially refer. This section (sec. 1) of the said act, so far as it is material to the present question, is as follows:

"That the President is hereby authorized, upon the acquisition of the property of the New Panama Canal Company and the payment to the Republic of Panama of the ten millions of dollars provided by article fourteen of the treaty between the United States and the Republic of Panama, the ratifications of which were exchanged on the twenty-sixth day of February, nineteen hundred and four, to be paid to the latter Government, to take possession of and occupy on behalf of the United States the zone of land and land under water of the width of ten miles, extending to the distance of five miles on each side of the center line of the route of the canal to be constructed thereon, which said zone begins in the Caribbean Sea three marine miles from the mean low-water mark and extends to and across the Isthmus of Panama into the Pacific Ocean to the distance of three marine miles from mean low-water mark, and also of all islands within said zone, and in addition thereto the group of islands in the Bay of Panama named Perico, Naos, Culebra, and Flamenco, and, from time to time, of any lands and waters outside of said zone which may be necessary and convenient for the construction, maintenance, operation, sanitation, and protection of the said canal, or of any auxiliary canals or other works necessary and convenient for

the construction, maintenance, operation, sanitation, and protection of said enterprise, the use, occupation, and control whereof were granted to the United States by article two of said treaty."

Articles 2 and 3 of the treaty between the United States and the Republic of Panama, mentioned in this section, are in the terms following:

"ARTICLE II.

"The Republic of Panama grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low-water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low-water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant. The Republic of Panama further grants to the United States in perpetuity the use, occupation, and control of any other lands and waters outside of the zone above described which may be necessary and convenient for the construction, maintenance, operation, sanitation, and protection of the said canal or of any auxiliary canals or other works necessary and convenient for the construction, maintenance, operation, sanitation, and protection of the said enterprise.

"The Republic of Panama further grants in like manner to the United States in perpetuity all islands within the limits of the zone above described and in addition thereto the group of small islands in the Bay of Panama, named Perico, Naos, Culebra, and Flamenco.

"ARTICLE III.

"The Republic of Panama grants to the United States all the rights, power, and authority within the zone mentioned

and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority."

It appears from these sections that the United States acquired in perpetuity "the use, occupation, and control" of the so-called Canal Zone, and also "all the rights, power, and authority within the zone mentioned * * * which the United States would possess and exercise if it were the sovereign of the territory." Unquestionably these provisions of the treaty imposed upon the United States the obligations as well as the powers of a sovereign within the territory described, and it is no less obvious that among these obligations was that of providing a government for the territory in question for the purpose, in the language of the second section of the act of Congress approved April 28, 1904, of "maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion." This obligation has been recognized by the Supreme Court of the United States in repeated decisions, among which I need only refer to *American Insurance Company* v. *Canter* (1 Peters, 512), and *Cross* v. *Harrison* (16 Howard 164).

It being, therefore, the duty of the United States to provide a government for the territory over which its control, with all the incidents of sovereignty, was established by the terms of the treaty, in the absence of any provision by Congress to effect this object, the President would be authorized and obliged by his duty as executive head of the nation under the Constitution to discharge the obligation thus resting upon the nation; and if Congress had taken no action whatever on the subject, the right of the President to thus administer the territory controlled by the nation would not be open to question. In fact, however, Congress, by the first section of the act above quoted, authorized the President "to take possession of and occupy on behalf of the United States" the territory generally known as the

Canal Zone, and covered by the terms of the treaty. This authority to take possession of and occupy would, of itself, imply the authority to govern in so far as government was needful to secure the safety and welfare of the inhabitants of the territory occupied, whether such inhabitants dwelt there at the time of its cession or came there for lawful purposes, and with the consent of the United States afterwards.

The second section of the act approved April 28, 1904, which is particularly mentioned in your letter, is as follows:

"That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers, as well as the power to make all rules and regulations necessary for the government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion."

In my opinion this provision is to be considered as declaratory only of what would have been the rights and duties of the President if it had not been enacted. It is true that by its terms its effect is limited to the duration of the Fifty-eighth Congress, but I do not understand this as meaning that Congress intended the Canal Zone to be without any legal government after the period fixed. Such a conclusion would be, in my opinion, wholly inadmissible, in view of the universally recognized duty on the part of any civilized power to provide a government for all territory under its control; and the limitation of time mentioned in this section must be interpreted, in my opinion, as inserted merely to show that, during the period of its own lawful existence, and unless led to hold differently by succeeding events, the Fifty-eighth Congress intended that the powers of government, which it might have lawfully exercised over the Canal Zone, should be exercised, by its authority and under its delegation, by the President or such officers or

persons as he might employ for the purpose. That Congress did not intend, or expect, the President's authority over the Canal Zone to end at the time mentioned in the second section of the act approved April 28, 1904, seems clear by the provision in the act approved December 21, 1905 (34 Stat., 5), making appropriations to continue the construction of the canal, to the effect that "the President shall annually cause to be made, by the persons appointed and employed by him in charge of the government of said Canal Zone * * * estimates of expenditures." By this provision Congress recognized the President as authorized to govern the Canal Zone and appoint and employ persons to take part in that government. Evidently, then, Congress did not consider the power expressly conferred upon the President by section two of the act of Congress approved April 28, 1904, as terminating at the time mentioned in that section.

In the case of *Wilson* v. *Shaw* (204 U. S., 24), the several acts of Congress are referred to as ratifying, by recognition, previous acts of the Executive in the acquisition of the Canal Zone and the construction of the canal. If it were necessary to do so, the terms of the act approved December 1, 1905, above quoted, might be relied upon as a ratification by Congress of the President's assumption of authority over the Canal Zone subsequently to the end of the Fifty-eighth Congress. In my opinion, however, no such ratification was necessary; and, in the absence of action by Congress distinctly denying him that right and establishing by law a state of anarchy in the Canal Zone, the President would have the power to administer this territory, merely because control, with the incidents of sovereignty, over it was possessed by the United States, and no other provision for its orderly government had been made.

It is hardly necessary to add that this authority on his part involves the right and the power to modify or repeal any laws previously existing within this territory, whether originally enacted before or after its acquisition by the United States. Laws, whatever their form, continue in force after the authority which enacted them has ceased to exist, only by the consent of the succeeding authority to their continu-

ing validity, implied from its failure to modify or repeal them; so soon as the new governing power considers them no longer appropriate to attain the ends of government, it has the inherent right to change or annul them, unless its authority in this respect has been expressly curtailed. There is nothing in this act approved April 28, 1904, or in any other act of Congress relating to this subject-matter, which discloses any purpose on the part of the Congress to give to determinations of the Isthmian Canal Commission a peculiar permanency, or to exempt them from modification or rescission in the discretion of the President.

I therefore answer your question in the negative and advise you that, in my opinion, the President may now, directly or through the persons appointed and employed by him to govern the Zone and build the canal, adopt needed rules and regulations for the government of the Canal Zone, and that he has not lost the power to modify any of the rules and regulations established by the Canal Commission prior to the expiration of the Fifty-eighth Congress.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

CUSTOMS LAW—INVOICE—APPRAISEMENT.

In an importation of a number of crates of glassware which were consolidated on one invoice at a lump sum, where the several crates were of different values, but chargeable with the same rate of duty, the assessment of duty should not be made upon the basis of the highest valued goods, but all the glassware is chargeable with the same rate of duty, and similarly with regard to a number of cases of pickles imported at the same time which were also placed on one invoice though of different values, but subject to the same rate of duty—the provisions of section 2910, Revised Statutes, having no application in either case.

Section 2910, Revised Statutes, is a rule for the assessment of rates of duty and not a rule for the appraisement of values, and has no application except to cases where the goods that have been invoiced at an average rate are not merely of different values, but are also subject to different rates of duty, in which case the duty is to be assessed upon the whole invoice at the rate to which the highest valued goods are subject.

In case of doubt as to whether a higher or a lower duty is imposed by a statute, the doubt should be resolved in favor of the importer, "since the intention of Congress to impose the higher duty should be expressed in clear and unambiguous language." (*American Net and Twine Co.* v. *Worthington*, 141 U. S., 468.)

DEPARTMENT OF JUSTICE,
February 1, 1907.

SIR: I have the honor to acknowledge receipt of your letter of November 14, 1906, in reference to thirteen crates of common glassware and thirty-two cases of pickles, imported at the port of San Juan, P. R., with inclosed copies of letters of the collector at that port, from which it appears that the several crates of glassware were consolidated on one invoice at a lump sum, and that the several cases of pickles were likewise consolidated upon another invoice; that upon examination the appraiser found the merchandise to be of different values and so returned it—that is, that the glassware in the several crates was of different values and the pickles in the several cases likewise of different values; but that, as stated in your letter, the whole of the glassware is chargeable with the same rate of duty, as are also the pickles.

In your letter you request my opinion as to whether in such case a rule of appraisement is afforded by the provisions of section 2910 of the Revised Statutes providing that, "When merchandise of the same material or description, but of different values, is invoiced at an average price, and not otherwise provided for, the duty shall be assessed upon the whole invoice at the rate to which the highest valued goods in such invoice are subject," and whether under this section the assessment of the duty upon the glassware and pickles, respectively, is required to be made upon the basis of the highest valued goods involved in either invoice, or whether, on the other hand, this statute is to be construed literally as relating only to cases where the goods are subject to different rates of duty.

I am of the opinion that section 2910 is a rule for the assessment of the rates of duty, and not a rule for the appraisement of values, and that it has no application except to cases where the goods that have been invoiced at an average rate are not merely of different values but are also

subject to different rates of duty, in which case the duty is to be assessed upon the whole invoice at the rate to which the highest valued goods are subject; and that as it appears in this instance that all the glassware is chargeable with the same rate of duty, and the pickles likewise, the provisions of section 2910 have no application to either invoice.

While in the first part of this section it is made one of the conditions of its application that the goods involved shall be "of different values," the final clause laying down the rule that shall then govern does not provide that the goods shall be appraised at an average value based upon that of the highest valued goods, but uses the very different and explicit language that "the duty shall be assessed upon the whole invoice at the rate to which the highest valued goods in such invoice are subject."

That this section was intended to refer to the rate of assessment rather than the appraisement of values is further emphasized by the contrast between the language of this section and that of section 2911, immediately following, which provides that, "Whenever articles composed wholly, or in part, of wool or cotton, of similar kind, but different quality, are found, in the same package, charged at an average price, it shall be the duty of the appraisers to adopt the value of the best article contained in such package, and so charged, as the average value of the whole."

The contrast between the concluding phrase, "the duty shall be assessed upon the whole invoice at the rate to which the highest valued goods in such invoice are subject," in section 2910, and the corresponding phrase, "it shall be the duty of the appraisers to adopt the value of the best article contained in such package * * * as the average value of the whole," in section 2911, is very marked and indicates clearly that section 2910 was intended to apply only in cases where the goods were not only of different values, but also chargeable with different rates of duty.

Hence, when the merchandise thus invoiced all bears the same rate of duty, it follows that section 2910 has no application, and that the values of the goods are not to be fixed by that of the highest valued article, but are to be appraised at actual values, in accordance with the general provisions

of the customs laws, except in such special cases as may be provided for under section 2911, or otherwise.

I regret that in reaching this conclusion I have been compelled to differ from the contrary views expressed in Treasury Decisions Nos. 9516, 12393, and 25326. I am unable, however, to concur in the view expressed in No. 9516 that "the word 'rate,' used in the latter part of the section, is used in the sense of amount of duty," or to reach the conclusion that the express provision of section 2910 that "the duty shall be assessed" at a certain "rate" is equivalent to a direction as to the amount at which the values of the goods shall be appraised; a conclusion which would require the language of the statute to be construed in a manner at variance with its fixed legal significance and would, furthermore, result in the unnecessary hardship of imposing upon the importer, merely because he has consolidated upon one invoice, at an average rate, articles of the same description and bearing the same rate of duty, an artificial valuation in excess of their real value. In case of doubt as to whether a higher or lower duty is imposed, that doubt should be resolved in favor of the importer, "since the intention of Congress to impose a higher duty should be expressed in clear and unambiguous language." (*American Net and Twine Co.* v. *Worthington*, 141 U. S., 468.)

In none of these Treasury Decisions, furthermore, is the distinction noted between the provisions of section 2910 and of section 2911, and in fact, in No. 25326 it is apparently assumed that they are the same, the decision referring to the case of *In re Schefer* (49 Fed. Rep., 216) as involving section 2910, whereas, in fact, the goods involved in that case were cotton goods and section 2911 was the only section considered by the court.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

CHEROKEE ENROLLMENT—MRS. ALICE L. OWEN AND CHILDREN.

The action of the attorney for the Cherokee Nation in protesting to the Secretary of the Interior on behalf of the Cherokee Nation against the enrollment of Alice L. Owen and her children as citizens by blood of the Cherokee tribe was not a compliance with the conditions named in the act of June 21, 1906 (34 Stat., 340), which authorized such enrollment provided it should not be objected to by said tribe, and should be approved by the Secretary of the Interior.

The authority of the attorney to act for the Nation did not extend to matters wherein positive action by the Nation itself was essential, as is required by the express terms of the act.

The tribal council not having been reelected, and there being now probably no officer or body in a position to make the objection required by the act, the first condition mentioned therein appears to have been fulfilled.

The Secretary of the Interior is required to determine for himself whether as matter of equity and public policy the enrollment should be made.

Suggested, that the children of Mrs. Owen were never *bona fide* citizens of the Cherokee Nation, and their enrollment would be clearly without justification were it not for the special act of Congress in question.

Suggested, that the marriage of Alice L. Owen to a white man, her departure from the Cherokee Territory and permanent residence in a distant State, operated as a relinquishment of her rights as a citizen under the terms of the Cherokee constitution, but she might still have been readmitted to citizenship by the governing body of the Cherokee Nation. Her enrollment, therefore, is not open to the objection existing in the cases of her children.

DEPARTMENT OF JUSTICE,
February 18, 1907.

SIR: I have the honor to submit my opinion in the matter of the Cherokee enrollment case of Alice L. Owen and her children, recently transmitted to me by you, upon the request of the President.

It appears to me unnecessary to recapitulate the various aspects in which this case has been presented to your Department and other official bodies, since the material feature in the case is contained in the following provision of the Indian appropriation act, approved June 21, 1906 (34 Stat., 340):

"That the Commissioner to the Five Civilized Tribes is hereby authorized to add the names of * * * Alice

Owen and her children, to the final roll of the citizens by blood of the Cherokee tribe, the said persons being * * * Cherokee Indians by blood, whose names, through neglect on their part or on the part of their parents, have been omitted from the tribal rolls: *Provided*, That the enrollment of said persons by the Commissioner to the Five Civilized Tribes shall not be objected to by the said tribes, and shall be approved by the Secretary of the Interior."

It will be observed that the authority hereby conferred upon the Commissioner to the Five Civilized Tribes was subject to two conditions: He was empowered (which in this case is equivalent to his being directed) to make the enrollment authorized, provided it should not be objected to by the tribe and should be approved by the Secretary of the Interior. It appears that on July 17 the Commissioner wrote to the attorney for the Cherokee Nation calling his attention to the foregoing provision of law, and notifying him that fifteen days would be allowed within which to file such protest as he might desire to make against the enrollment of the parties mentioned. On July 24 the attorney for the Cherokee Nation replied to this letter, protesting against the enrollment of Alice L. Owen and her children "on behalf of the Cherokee Nation." No other action by the Nation, or any of its officers, has been taken in the premises, and it is therefore material to determine whether the objection thus made by the attorney can be considered an objection made by the tribe under the terms of the act of Congress.

I have examined the agreement between the attorney and the tribe, which appears to have been executed on April 4, 1906, by the principal chief and the attorney, and do not think it confers upon the attorney authority to act for the Nation in a matter wherein positive action by the Nation itself is required by the express terms of an act of Congress.

After various experiences extending during a period of some six years, and which had been preceded by an agitation of the questions involved in the governing body of the Cherokee Nation for nearly twenty years, it had been finally decided that none of the parties mentioned in this act were entitled to enrollment. In passing this special act for their

benefit, Congress therefore conferred on them, not as a matter of right but as a matter of favor, the privileges of Cherokee citizenship, and required as a condition the implied assent of the Cherokee Nation itself to this gratuity. I do not think the attorney was qualified or empowered to act for the nation in a matter of this kind, but that the objection required by the act of Congress must have been made by the regularly constituted authorities of the Nation itself. I am informed that the tribal council was not reelected at the expiration of the terms of its members, and that it is, at least, extremely doubtful whether any officer or body is now in a position to make the objection on behalf of the Cherokee Nation required by the terms of this statute. It does not appear, however, that either Alice L. Owen or any of her children had any responsibilty for this condition of affairs, and their interests ought not, therefore, to suffer in consequence. It follows that the first condition mentioned in the act of Congress, namely, that the tribe shall not object, appears on the record to have been fulfilled in this case. There remains the second condition, namely, the approval of the Secretary of the Interior. With respect to this, I am quite clear that it was the intention of the Congress to lodge a special discretion as to the approval of this enrollment with the Secretary of the Interior. His approval is required in general to all acts of the Commissioner to the Five Civilized Tribes, but I do not construe the provision of law above quoted as merely requiring this general and customary approval, but as obliging the Secretary of the Interior to determine for himself whether, as a matter of equity and public policy, the enrollment should take place. In this view of the matter, it would be under ordinary circumstances obviously inappropriate for me to express any opinion as to how this discretion should be exercised. I limit myself, therefore, to calling your attention to certain circumstances disclosed by the record, which appear to be material in connection with this question.

The children of Mrs. Owen were never, in my judgment, *bona fide* citizens of the Cherokee Nation. They were the offspring of a white man, a resident and presumably a citizen of Virginia, and appear to have always considered and

demeaned themselves as citizens of that State; one of them, at least, even exercised the right of suffrage there. It does not appear that any of them ever removed to the territory of the Cherokee Nation with the intention of making it their home, and, as they have in no respect shared the burdens or discharged the duties of Cherokee citizens, their enrollment as such would clearly be without justification either in law or according to the principles of equity, if it were not for the special act of Congress so, as aforesaid, passed for their benefit, and which can become effective only through your affirmative action in their favor.

The case of Alice L. Owen herself appears to be different. She is a Cherokee by blood, at least to some extent; was born within the territory of the Nation, and spent her childhood there. There seems no good reason to doubt that prior to her marriage she was a Cherokee citizen. The Cherokee constitution provides:

"That whenever any citizen shall remove with his effects out of the limit of this Nation, and become a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease: *Provided, nevertheless*, that the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the Nation, on memorializing the national council for such readmission."

While I think her marriage to a white man, departure from the Cherokee territory, and permanent residence in Virginia must be considered a relinquishment of her rights and privileges as a citizen under the terms of this provision of the constitution, I think it is also clear that she might have been readmitted to citizenship by the governing body of the Nation. It is true that no such action was taken by the council, but the committee on citizenship appears to have admitted not only Mrs. Owens but all her children "to all the rights and privileges of Cherokee citizenship by blood" as long ago as January 31, 1881; and it is not improbable that this action would have been confirmed by the national council had such confirmation been deemed necessary.

Under all the circumstances I think the enrollment of Mrs.

Owen a matter fully and clearly within your discretion, and that no such argument against it exists as can be found in the cases of her children.

I remain, sir, respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE INTERIOR.

CHOCTAW CITIZENSHIP CASES—CITIZENSHIP COURT—FINALITY OF JUDGMENT.

Myrtie Randolph and W. J. Thompson were children of a white father by his third wife, a white woman, his first and second wives having been Choctaws. Both parents and these children lived in the Choctaw Nation and were recognized and regarded as Choctaw citizens. The children were enrolled by the Choctaw Committee on Citizenship in 1892. Their application to the Commission to the Five Civilized Tribes for enrollment under the act of June 10, 1896 (29 Stat., 321, 339), was denied, which decision was reversed by the United States court in the Indian Territory, and its judgment affirmed by the Supreme Court. (174 U. S., 445, 469.) Subsequently, on appeal by the Nation under the act of July 1, 1902 (32 Stat., 641, 646–649), their application was denied by the Choctaw and Chickasaw Citizenship Court. *Held*, that the citizenship court had jurisdiction and that its judgment is final.

The application for enrollment under the act of June 10, 1896 (29 Stat., 339), notwithstanding the fact that applicants were already on the rolls, was a waiver of the conclusiveness of the rolls in their cases, the act providing that the Commission shall hear and determine the application of all persons who may apply to them for citizenship in any of said nations.

The act of July 1, 1902 (32 Stat., 641), contemplated that the Citizenship Court should have a revisory jurisdiction of all judgments of the United States courts in the Indian Territory admitting persons to citizenship on appeal from the judgments of the Commission, whether the applicants were on the tribal rolls or not.

No authority has been conferred upon the Secretary of the Interior by the acts of July 1, 1902, paragraph 30 (32 Stat., 646), and April 26, 1906 (34 Stat., 137), to review the judgments of the Citizenship Court.

Cyrus H. Kingsbury and Lucy E. Littlepage, children of white parents who had become affiliated with the Choctaw Nation by an act of the Choctaw council, and thereby granted all rights, privileges, and immunities of Choctaw citizens, were born in the Choctaw Nation, have always resided there as its recognized citizens, and their names appear upon various tribal rolls. They applied to the Commission to the Five Civilized Tribes under the act of June 10, 1896 (29 Stat., 321, 339),

and were enrolled, and no appeal was taken by the nation. *Held*, that they are clearly entitled to enrollment.

The only names which the act of June 28, 1898, section 21 (30 Stat. 495, 502–503), declares shall be eliminated from the tribal rolls are those placed thereon by fraud or without authority of law.

Since 1875 the Choctaw Nation never intended that a white person intermarrying into the tribe should have power to confer citizenship upon his children by a subsequent marriage to other than a citizen by blood, but this does not apply where both parents have been adopted into the tribe.

Loula West was admitted to citizenship in the Choctaw Nation by the Commission to the Five Civilized Tribes. The nation appealed to the United States courts in the Indian Territory and the judgment was affirmed. Later, under the act of July 1, 1902 (32 Stat., 641, 647), the case was removed to the Citizenship Court, which denied her application. *Held*, that the Citizenship Court had jurisdiction of such cases, and its judgments therein are final.

William C. Thompson applied to the Commission to the Five Civilized Tribes for the enrollment of himself, wife, and children. The application was denied by the Commission, and no appeal was taken therefrom. Claimant relies upon the fact that their names appear upon the tribal roll prepared pursuant to the Choctaw acts of September 18 and October 30, 1896. *Held*, that the action of the Commission, not having been appealed from, was final, and that the Choctaw Nation, even if it attempted to do so, had no right thereafter to admit them, such enrollment being without authority of law.

The provision in the act of June 10, 1896 (29 Stat., 339), that "any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon" might apply to the legally constituted court or committee of such tribes, with right of appeal to the United States court, had reference to a previous denial or failure of the tribal authorities to act, and not to action or nonaction of the Commission.

Richard B. Coleman and children were admitted to citizenship in the Choctaw Nation by an act of the general council of the nation, which the record of the case shows was procured by fraud, and the Commission held that they had no right to disregard this act of the council. *Held*, that their names should be stricken from the rolls.

Ethel Pierson's case. The children of Choctaw freedmen who were minors living March 4, 1906, are entitled to enrollment.

DEPARTMENT OF JUSTICE,
February 19, 1907.

SIR: I have the honor to communicate to you my opinion in certain Choctaw Indian citizenship cases, the first two submitted by your letter of May 29, 1906, and the others

by the direction of the President under date of January 19, 1907.

1. The first case is that of Myrtie Randolph and her brother, W. J. Thompson, in regard to which you say:

"Myrtie Randolph and W. J. Thompson are children of Giles Thompson, white, intermarried in the Choctaw Nation in Mississippi prior to the treaty of September 27, 1830 (7 Stat., 333), and was one of the parties named by supplementary Article II (ib. 340) as entitled to a section and a half, reserved to him from the ceded lands, to be so selected as 'to include their present residence and improvement.' His first and second wives were Choctaws. His name appears on page 64, volume 7, American State Papers (Public Lands), as a beneficiary of Article XIX of the treaty of September 27, 1830, and on page 28, volume 1, of the record in suit of the *Choctaw Nation* v. *United States*, Court of Claims. He was registered under the treaty as citizen of the Choctaw Nation, Mushulatubbee's District, and with his family was transported under the treaty as Choctaws, at expense of the United States, from Mississippi to the Choctaw Nation, west, prior to October 24, 1833, when he petitioned the President, from Doakesville, near the Red River, in the southern part of the Choctaw Nation, to approve sale of his Mississippi lands to James Gay, of Mississippi, and for issue of patent therefor (copy A inclosed). In the Choctaw Nation, west, in Indian Territory, in 1863, in accordance to Choctaw law, he married a white woman, citizen of the United States, of whom the applicants were born. He was living October 19, 1865, and was paid by the Choctaw Nation for beeves furnished June, 1865. (Copy of act of council of October 19, 1865, is inclosed, B.) He continued to live in the nation, and was recognized as a citizen until his death, aged 76 years, and his estate was administered in the Choctaw courts as that of an Indian and within their jurisdiction. The applicants, his children, were born in the Choctaw Nation, were admitted to and attended the Choctaw schools as Choctaws, and in all respects enjoyed and were accorded the privileges of native-born Choctaws. The applicants were enrolled by Choctaw Committee on Citizenship in 1892 as Choctaw citizens.

The Department is not yet advised whether they are borne on any other of the Choctaw rolls. They settled and improved tribal lands, as the father before had done in Mississippi, as Choctaws, erected homes, and were never ousted or objected to or regarded as intruders.

"September 8, 1896, these applicants and others applied to the Commission to the Five Civilized Tribes for enrollment under the act of June 10, 1896 (29 Stat., 321, 339), and December 7, 1896, were denied. Applicants appealed to the United States court, southern district, Indian Territory, which, January 18, 1898, reversed the Commission and admitted the applicants. From this judgment the nation appealed and the judgment was affirmed (reported as *Stephens* v. *Cherokee Nation* and *Choctaw Nation* v. *Robinson*, 174 U. S., 445, foot note page 469, case No. 589; *Same* v. *Randolph et al.*). Subsequently, under the act of July 1, 1902 (32 Stat., 641, 646–9), the matter was brought by appeal of the nations to the Choctaw-Chickasaw Citizenship Court, which, November 29, 1904, denied the application—copy of opinion therein, and in *Wall* v. *Choctaw Nation et al.*, and in *E. H. Bounds* v. *Choctaw and Chickasaw Nations*, whereon both were founded, are inclosed (C, D, E)."

The validity and finality of the citizenship court are therefore a vital feature of this case. In regard to its judgment you say in your letter:

"Bearing upon the validity of this judgment, your attention is called to the fact that the act of June 10, 1896, gave no power to the Commission to the Five Civilized Tribes to purge the tribal rolls, which were by the act confirmed. Power to purge the rolls was first conferred on the Commission by the act of June 7, 1897 (30 Stat., 84), and further by section 21, act of June 28, 1898 (30 Stat., 495, 502). Wherefore this Department holds that no jurisdiction was given the Commission, or to the courts on appeal therefrom, to exclude persons having tribal recognition and borne on the tribal rolls, but that such persons, notwithstanding prior adverse action by the Commission or the courts, are entitled to enrollment under the act of 1898 and supplementary acts, unless their inscription on the tribal rolls was procured by fraud or was without authority of law. Such

has been the rule of this Department since decision in the case of Wiley Adams, May 21, 1903, discussed and concurred in by the Assistant Attorney-General, Interior Department (Opinions of March 24, 1905), in cases of Benjamin J. Vaughn and Mary Elizabeth Martin. In Vaughn's case counsel for the nations acceded to it as the proper rule."

To determine the validity and the finality of the judgment of the Citizenship court, as well as other questions arising in these cases, it is necessary to consider carefully the entire legislation of the Congress on this subject.

The act of June 10, 1896 (29 Stat., 321, 339), directed the Commission to the Five Civilized Tribes in the Indian Territory to continue the exercise of the authority theretofore conferred upon them to negotiate with such tribes for the extinguishment of the tribal title to their lands, by the cession of the same or a part thereof to the United States, or their allotment in severalty to the members of such tribes, with a view to the ultimate creation of a State or States embracing such lands.

That act also provided—

"That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled: *Provided, however*, That such application shall be made to such Commissioners within three months after the passage of this Act. The said Commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes: *And provided, further*, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or

not acted upon, or any citizen who may within three months from and after the passage of this Act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this Act, it or he may appeal from such decision to the United States district court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

"That the said Commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this Act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

"The Commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs to remain there for use as the final judgment of the duly constituted authorities."

The act of June 7, 1897 (30 Stat., 62, 84), contained this provision:

"That said Commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this Act if in conflict therewith as to said nation: *Provided*, That the words 'rolls of citizenship,' as used in the Act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the Commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such Commission for a period of six months after the passage of this Act. And any name appearing on such rolls and not confirmed by the Act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such Commission where the party affected shall have ten days' previous notice that said Commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided, also*, That any one whose name shall be stricken from the roll by such Commission shall have the right of appeal, as provided in the Act of June tenth, eighteen hundred and ninety-six."

The act of June 28, 1898 (30 Stat., 495, 502–3), provided:

"SEC. 21. That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding Acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to per-

sons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such inter-married white persons as may be entitled to citizenship under Cherokee laws.

* * * * *

"Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.

* * * * *

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

The act of May 31, 1900 (31 Stat., 221, 236), provided:

"That said Commission shall continue to exercise all authority heretofore conferred upon it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such application shall be final when approved by the Secretary of the Interior."

The act of March 3, 1901 (31 Stat., 1058, 1077), contained this provision:

"The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto."

The act of July 1, 1902 (32 Stat. 641), ratified an agreement made by the Commission to the Five Civilized Tribes with the Commission representing the Choctaw and Chickasaw tribes. This agreement was subsequently ratified by those two nations as required therein. In regard to rolls of citizenship it provided:

"27. The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the act of Congress approved June 28, 1898 (30 Stat., 495), and the act of Congress approved May 31, 1900 (31 Stat., 221), except as herein otherwise provided: *Provided*, That no person claiming right to enrollment and allotment and distribution of tribal property, by virtue of a judgment of the United States court in the Indian Territory under the act of June 10, 1896 (29 Stat., 321), and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined.

"28. The names of all persons living on the date of the final ratification of this agreement entitled to be enrolled as provided in section 27 hereof shall be placed upon the rolls made by said Commission; and no child born thereafter to a citizen or freedman and no person intermarried thereafter to a citizen shall be entitled to enrollment or to participate in the distribution of the tribal property of the Choctaws and Chickasaws.

"29. No person whose name appears upon the rolls made by the Commission to the Five Civilized Tribes as a citizen or freedman of any other tribe shall be enrolled as a citizen or freedman of the Choctaw or Chickasaw nations.

"30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen, the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and of Choctaw and Chickasaw freedmen, upon which allotment of land and distribution of other tribal property shall be made as herein provided. Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes.

"31. It being claimed and insisted by the Choctaw and Chickasaw nations that the United States courts in the Indian Territory, acting under the Act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in the Choctaw and Chickasaw nations, respectively, without notice of the proceedings in such courts being given to each of said nations; and it being insisted by said nations that, in such proceedings, notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceeding in the United States courts in the Indian Territory, under the said Act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized

Tribes, upon the papers and evidence submitted to such commission, and should not have extended to a trial de novo of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately and making the other a party defendant, may, within 90 days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days there-

after by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers and proceedings, and, upon the filing in such citizenship court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein.

"32. Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in Indian Territory rendered under said Act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly or by either of them acting separately at any time within six months after this agreement is finally ratified. In the exercise of such appellate jurisdiction said citizenship court shall be authorized to consider, review, and revise all such judgments, both as to findings of fact and conclusions of law, and may, whenever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the time hereinbefore specified and shall be taken, conducted and disposed of in the same manner as appeals by the said nations, save that

notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations: *Provided*, That paragraphs thirty-one, thirty-two and thirty-three hereof shall go into effect immediately after the passage of this Act by Congress.

"33. A court is hereby created to be known as the Choctaw and Chickasaw citizenship court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty-first day of December, nineteen hundred and three. Said court shall have all authority and power necessary to the hearing and determination of the suits and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process and orders, and to prescribe rules and regulations for the transaction of its business. It shall also have all the powers of a circuit court of the United States in compelling the production of books, papers and documents, the attendance of witnesses, and in punishing contempt.

"Except where herein otherwise expressly provided, the pleadings, practice and proceedings in said court shall conform, as near as may be, to the pleadings, practice and proceedings in equity causes in the circuit courts of the United States. The testimony shall be taken in court or before one of the judges, so far as practicable. Each judge shall be authorized to grant, in vacation or recess, interlocutory orders and to hear and dispose of interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges, a clerk, a stenographer, who shall be deputy clerk, and a bailiff. The judges shall be appointed by the President, by and with the advice and consent of the Senate, and shall each receive a compensation of five thousand dollars per annum, and his necessary and actual traveling and personal expenses while engaged in the performance of his duties. The clerk, stenographer, and bailiff shall be appointed by the judges, or a majority of them, and shall receive the following yearly compensation: Clerk, two thousand four hundred dollars; stenographer, twelve hundred dollars; bailiff, nine hundred dollars. The compensation of all these officers shall be paid

by the United States in monthly installments. The moneys to pay said compensation are hereby appropriated, and there is also appropriated the sum of five thousand dollars, or so much thereof as may be necessary, to be expended under the direction of the Secretary of the Interior, to pay such contingent expenses of said court and its officers as to such Secretary may seem proper. Said court shall have a seal, shall sit at such place or places in the Choctow and Chickasaw nations as the judges may designate, and shall hold public sessions, beginning the first Monday in each month, so far as may be practicable or necessary. Each judge and the clerk and deputy clerk shall be authorized to administer oaths. All writs and process issued by said court shall be served by the United States marshal for the district in which the service is to be had. The fees for serving process and the fees of witnesses shall be paid by the party at whose instance such process is issued or such witnesses are subpœnaed, and the rate or amount of such fees shall be the same as is allowed in civil causes in the circuit court of the United States for the western district of Arkansas. No fees shall be charged by the clerk or other officers of said court. The clerk of the United States court in Indian Territory, having custody and control of the files, papers, and proceedings in the original citizenship cases, shall receive a fee of two dollars and fifty cents for transferring and certifying to the citizenship court the files, papers, and proceedings in each case, without regard to the number of persons whose citizenship is involved therein, and said fee shall be paid by the person applying for such transfer and certification. The judgment of the citizenship court in any or all of the suits or proceedings so committed to its jurisdiction shall be final. All expenses necessary to the proper conduct, on behalf of the nations, of the suits and proceedings provided for in this and the two preceding sections shall be incurred under the direction of the executives of the two nations, and the Secretary of the Interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necessary out of any of the joint funds of said nations in the Treasury of the United States."

It appears that the agreement in these paragraphs provides for the establishment of the Choctaw and Chickasaw Citizenship Court, and gives it jurisdiction of a test suit to annul and vacate the decisions of the United States courts in the Indian Territory admitting persons to citizenship and enrollment as citizens of the Choctaw and Chickasaw nations, respectively, on the ground of want of notice to both of said nations and because the United States courts tried such cases *de novo*, with a right, in the event such judgments should be annulled because of either or both of the irregularities mentioned on the part of any party thus deprived of a favorable judgment to remove his case to the Citizenship court, where such further proceedings were to be had therein "as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and if no judgment or decision had been rendered therein;" and also "appellate jurisdiction over all judgments of the courts in Indian Territory, rendered under said act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment in either of said nations." In the exercise of such appellate jurisdiction the citizenship court was "authorized to consider, review, and revise all such judgments, both as to findings of fact and conclusions of law, and may, whenever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy."

It will be noted that the agreement further provides (paragraph 33) that "the judgment of the citizenship court in *any or all* of the suits or proceedings so committed to its jurisdiction *shall be final.*"

The agreement also contained this provision:

"34. During the ninety days first following the date of the final ratification of this agreement, the Commission to the Five Civilized Tribes may receive applications for enrollment only of persons whose names are on the tribal rolls, but who have not heretofore been enrolled by said Commission, commonly known as "delinquents," and such inter-

married white persons as may have married recognized citizens of the Choctaw and Chickasaw nations in accordance with the tribal laws, customs, and usages on or before the date of the passage of this act of Congress, and such infant children as may have been born to recognized and enrolled citizens on or before the date of the final ratification of this agreement; but the application of no person whomsoever for enrollment shall be received after the expiration of the said ninety days: *Provided*, That nothing in this section shall apply to any person or persons making application for enrollment as Mississippi Choctaws, for whom provision has herein otherwise been made."

By the act of April 21, 1904 (33 Stat., 189, 204), it was provided that the Commission to the Five Civilized Tribes should conclude its work and terminate on or before July 1, 1905, and cease to exist on that date, the powers theretofore conferred upon it being continued.

By the act of March 3, 1905 (33 Stat., 1048, 1060), it was provided "that the work of completing the unfinished business, if any, of the Commission to the Five Civilized Tribes shall devolve upon the Secretary of the Interior, and that all the powers heretofore granted to the said Commission to the Five Civilized Tribes are hereby conferred upon the said Secretary on and after the first of July, nineteen hundred and five."

By the act of April 26, 1906 (34 Stat., 137), it was provided:

"That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of

this act, in which cases such motion shall be made within sixty days after the passage of this act."

By that act the rolls of citizenship of the several tribes were required to be completed by March 4, 1907.

After very carefully considering this legislation in the light of the circumstances under which it was enacted, I am constrained to the conclusion that the Citizenship court had jurisdiction of the cases now under consideration, and that its judgment therein is final.

By the act of June 10, 1896, the Commission to the Five Civilized Tribes was "authorized and directed to proceed at once to hear and determine the application of *all* persons who may apply to them for citizenship in any of said nations." It is true that this act also confirmed the then existing rolls of the several tribes, but the question whether an applicant was, as matter of fact, already duly enrolled upon one of the rolls so confirmed constituted, in my opinion, an issue upon which the Commission was authorized and required to pass. The applicant may be fairly held to have waived by his application the conclusiveness of the confirmation of the rolls in his case.

Independently of any such waiver, I do not see how the proposition that the Commission did not have jurisdiction of the case of a person whose name was upon a tribal roll can be maintained in the face of the provision of the act of June 10, 1896, that "in determining all said applications said Commission shall * * * give due force and effect to the *rolls*, usages, and customs of each of said nations or tribes." I think that act left it to the Commission to determine whether or not the applicant was upon a roll which was confirmed, and evidently it did not so hold in these cases.

It is unnecessary, however, to determine what might have been the effect of an adverse judgment in the case of an applicant whose name was upon a roll so confirmed, for such confirmation was certainly and very materially modified by the act of June 7, 1897, and apparently altogether withdrawn by the act of June 28, 1898. The act of June 7, 1897, provided that the words "rolls of citizenship" as used in the act of June 10, 1896, should be construed to mean the

"last authenticated rolls of each tribe which have been approved by the council of the nation." I am informed that there never was any such an authenticated roll of the Choctaw tribe, either at the time of the passage of the act of June 10, 1896, or subsequently thereto. Moreover, by the act of June 28, 1898, it was provided that in making rolls of citizenship of *the several* tribes, the Commission should take the Cherokee roll of 1880 as *the only* roll intended to be confirmed by that and preceding acts of Congress. It seems to be clear from the further provisions of the act that the Congress did not here refer to the Cherokee rolls only, but had in mind those of all the tribes. To my mind, however, the decisive consideration is that Congress, knowing there were certain cases of contested citizenship in the Choctaw and Chickasaw nations, referred these cases, under carefully defined conditions, to the Citizenship court and made the determination of that court in those cases final. This provision of law repealed, as to cases in this category, any inconsistent provisions (if any there were) in the act of 1896 or any other prior act. These cases were unquestionably within the terms of the law; the claimants had been admitted to citizenship by decisions of the United States courts, and it seems clear that, under the agreement with the Choctaw and Chickasaw nations ratified by the act of July 1, 1902, it was intended that the Citizenship court should have a revisory jurisdiction of judgments of the United States courts in the Indian Territory in citizenship cases, irrespective of the grounds on which these suits had been entertained by the said courts. That agreement was made after theconfirmation given to the tribal rolls had been qualified, if not withdrawn, and, we must presume, with a knowledge of the fact that the Commission, under the act of June 10, 1896, had exercised jurisdiction in the case of persons whose names appeared upon some of the rolls of the tribes. Its action seems to show that Congress did not intend to confirm any roll of the Choctaw and Chickasaw tribes; but, however that may be, when, with a knowledge of all that had gone before, it created the Citizenship court, this was done, in my opinion, with the evident purpose of giving it jurisdiction of all citizenship cases which had been decided by the United States courts for the Indian Territory on

appeal from the judgments of the Commission. As neither Congress nor the nations made any distinction in the act and agreement referred to as to the cases of persons whose names were on a tribal roll which might have been confirmed by the act of June 10, 1896, if Congress had not decided otherwise, I do not think any other authority can make this distinction. Indeed, as I have suggested, the applicants themselves, having voluntarily submitted to the jurisdiction of the Commission, might be fairly held estopped to now deny it.

I understand that it is not contended, nor do I think it could be successfully maintained, that any authority to review the judgments of the Citizenship court was intended to be conferred upon you by Congress when it made the rolls, as finally compiled, subject to your approval (see paragraph 30 of the agreement ratified by the act of July 1, 1902). Neither do I think that the provision in the act of April 26, 1906, above quoted, as to enrolling persons and entertaining motions to reopen or reconsider citizenship cases, was intended to recognize or confer any such authority, the purpose of that provision being simply to limit the time in which the authority previously conferred might be exercised. To hold thus would be to treat the later act as a repeal of so much of the former as expressly declared the judgments of the Citizenship court to be final, which seems to me untenable.

This disposes of the cases of Myrtie Randolph and her brother, W. J. Thompson. Whatever their intrinsic merits, these claims have been finally decided adversely to the claimants by the judgment of the citizenship court.

2. THE CASE OF CYRUS H. KINGSBURY AND LUCY E. LITTLEPAGE.

The second case is that of Cyrus H. Kingsbury and Lucy E. Littlepage, in regard to whom you say:

"Cyrus H. Kingsbury and Lucy E. Littlepage are children of John Parker-Kingsbury and wife, Hannah Mariah, white, affiliated by act of the Choctaw council of November 15, 1854, which enacted:

"'That all rights, privileges, and immunities of Choctaw

citizens are hereby granted unto John Parker-Kingsbury and to his wife, Hannah Mariah, and they shall enjoy all the benefits to which the citizens of this nation may hereafter be entitled, except in the participation of any sum of money which may now be due the nation under treaty stipulations heretofore made.'

"Both applicants were born in the Choctaw Nation and have always resided there as its recognized citizens. Both are on the tribal Choctaw 1885 census roll, Atoka County, Nos. 819, 821. September 7, 1896, they applied to the Commission to the Five Civilized Tribes under the act of June 10, 1896, were enrolled, and no appeal was taken. Cyrus H. Kingsbury is on the 1896 Choctaw census roll. Lucy E. Littlepage is on the partial roll of Choctaw citizens by blood, and her husband, Patrick H. Littlepage, is on the roll of intermarried citizens—both rolls approved by the Secretary of the Interior, October 21, 1904. Patent, signed and executed by the principal chief of the Choctaw Nation, conveying to Cyrus H. Kingsbury allotted tribal lands as a citizen by blood, is now before the Secretary of the Interior for approval, but is not yet approved or delivered. No objection to occupation of tribal lands was ever made against either applicant as an intruder."

Paragraph 27 of the agreement with the Choctaw and Chickasaw nations, ratified by the act of July 1, 1902, provides that the rolls of Choctaw and Chickasaw citizens shall be made by the Commission to the Five Civilized Tribes "in strict compliance" with the acts of June 28, 1898, and May 31, 1900.

Section 21 of the act of June 28, 1898, after providing that in making rolls of citizenship of the several tribes the Commission shall take the roll of Cherokee citizens of 1880 as the only roll intended to be confirmed by that and preceding acts of Congress, and providing for the enrollment of the Cherokees, authorizes and directs the Commission "to make correct rolls of the citizens *by blood* of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were

made, *with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.*"

It might be held that the only white persons intended to be enrolled by this act were such intermarried ones as were entitled to citizenship under the treaties and laws of the tribes, if it were not for the reference to the tribal rolls, on which, as appears from your statement as to these parties, there were undoubtedly the names of adopted whites. The only names which the act declares shall be eliminated from the tribal rolls are those placed thereon by fraud or without authority of law, and it is not suggested that the names of these parties were open to either of those objections.

Light, it seems to me, is thrown on this matter by the act of May 31, 1900, which was also directed to be strictly complied with in making the rolls of citizenship of these tribes. That act is plainly intended to be of a restrictive nature, yet a fair construction of it would seem to authorize the enrollment of these parties. It provides that the Commission shall continue to exercise all authority theretofore conferred upon it by law, "but it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in the Indian Territory who has not been a recognized citizen thereof and duly and lawfully enrolled or admitted as such, and its refusal of any such application shall be final when approved by the Secretary of the Interior."

This act recognizes the authority of the Commission to receive, consider, and record the application of a recognized citizen of any of the tribes referred to who has been duly and lawfully enrolled or admitted as such, its refusal of the application of any person not so qualified being made final when approved by the Secretary of the Interior.

These applicants appear to possess all of these qualifications. Your letter states that they were born and have always resided in the Choctaw Nation as its recognized citizens; that their names appear upon various tribal rolls, and that they were admitted by the Commission in 1896 as citizens, no appeal from the decision of the Commission being taken by the nation. That they were duly and lawfully

enrolled by the tribal authorities would seem to result from the fact that both of their parents had been adopted into the tribe, and the failure to contest the action of the Commission in admitting them would indicate that their citizenship rights were regarded as indisputable.

You say that you would not have doubt that these applicants, born to the allegiance of the Choctaw Nation, are entitled to be enrolled, but for the report of my predecessor to the President of February 24, 1906, in the case of persons without Indian blood, and the order to you of February 27, 1906, that "in the President's judgment, without reference to the act of Congress, it is perfectly clear equity demands that the son of white parents, who has no Indian blood in his veins, even though *one* of these parents has been adopted into the tribe, should not be treated as an Indian."

The report of Mr. Moody and the order of the President thereon had reference to the case of children of white persons, one of whom had previously acquired Indian citizenship by virtue of his marriage into the Choctaw tribe, but had afterwards, upon the death of his Indian spouse, married a white person. Mr. Moody was of opinion that the right of citizenship acquired by an intermarried white was a personal right and could not be conferred upon children by such subsequent marriage, which is also the view taken by the citizenship court.

I see no reason to question the soundness of that conclusion, assuming that the matter is still open for consideration. It is expressly provided by the Choctaw act of November 9, 1875, providing for the intermarriage of whites with Choctaws, that a white person intermarrying into the tribe in pursuance of that act should forfeit his rights of citizenship acquired thereunder, if upon the death of his Indian spouse he married "a white man or woman, or person, as the case may be, having no rights of Choctaw citizenship by blood."

I am aware that it has been held by one of the United States courts in the Indian Territory that this law is inconsistent with the treaty of April 28, 1866, but, with great respect for the said court, I do not so consider it. That treaty provides:

"ART. 38. Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw."

This article merely recognizes a pre-existing custom of the Choctaw and Chickasaw nations as to the intermarriage and adoption of white persons, and can not fairly be said to have been intended to prevent them from decitizenizing an intermarried person for good cause; and what better cause could there be than that the tie which bound him to the tribe, and because of which alone citizenship was granted, was broken?

An act of the Choctaw Nation, approved October 30, 1896, providing for the enrollment of Choctaw citizens, provided that "the Commission shall enroll as citizens all who come under any one of the following heads, and all such persons are hereby declared citizens of the Choctow Nation:"

* * * * *

"V. All white men who have married Choctaw women by blood in strict conformity to the laws of the Choctaw Nation of 1875 regulating intermarriage, or the Chickasaw law of 1876 regulating intermarriage, and have not been divorced from same *nor married any other than a Choctaw woman by blood since said marriage.*

* * * * *

"VIII. All white women who have married Choctaws by blood legally and have not been divorced from them *nor since married any other than a Choctaw by blood*, a recognized citizen and resident of the Choctaw or Chickasaw Nation."

* * * * *

That act further provided that "the commissions are especially prohibited from enrolling as citizens any persons coming under the following heads:"

* * * * *

"*II. The children of any marriage where neither the father nor mother are Choctaws by blood*, though one or

both of said children's parents may have enjoyed intermarried rights.

"III. All persons who, though they had at one time intermarried rights, *afterwards married a person not a Choctaw by blood* (being the father or mother of Choctaw children shall not save a person from this clause).

* * * * *

"VI. All white persons who have been admitted to citizenship with their wife or husband by the General Council and afterwards the wife or husband, Choctaw by blood, dying, the surviving party, being a white person, *has intermarried with a person not a Choctaw by blood.*"

* * * * *

It is clear that, at least since 1875, the Choctaw Nation never intended that a white person intermarrying into the tribe should have power to confer citizenship upon his children by a subsequent marriage to other than a citizen by blood. The informal opinion of Attorney-General Moody unquestionably had reference to cases of this character.

The case of the present applicants is quite different from that just referred to. Here both parents were adopted into the tribe. It must have been contemplated that they might have children; and if so, what was to be their citizenship if not that of their parents?

The facts in the present case answer this inquiry. Your letter states that these applicants have always been recognized as citizens of the Choctaw Nation; that their names appear on the tribal census roll of 1885, as well as upon the rolls prepared in pursuance of the Choctaw act of October 30, 1896. It seems clear, therefore, irrespective of the action of the Commission in admitting them as citizens in pursuance of the authority granted to it by the act of June 10, 1896, that they are clearly entitled to be enrolled for allotment purposes.

3. THE CASE OF LOULA (OR LULU) WEST, ET AL.

It appears from the papers in this case that Loula West applied to the Commission to the Five Civilized Tribes, pursuant to the act of June 10, 1896, for admission to

citizenship in the Choctaw Nation and was admitted as a citizen by blood; that the Choctaw Nation appealed to the United States Court for the Central District of the Indian Territory, which affirmed the judgment of the Commission; that this judgment was annulled and vacated by the judgment of the Citizenship court in the test case provided for by the act of July 1, 1902 (32 Stat., 641, 647), and thereupon she removed her case to that court, which denied her application.

This case is similar to that of Myrtie Randolph and her brother, W. J. Thompson, children of Giles Thompson, above referred to, in that it involves the question of the finality of the judgment of the Citizenship court, it being contended that the Commission in the first instance and the Citizenship court ultimately on appeal had no jurisdiction of the case because at the time of her application to the Commission her name was upon a tribal roll.

For the reasons heretofore stated, I think this contention is not well founded, and that the Citizenship court had jurisdiction of such cases, and its judgments therein were final.

4. THE CASE OF WILLIAM C. THOMPSON ET AL.

In this case the record shows that Thompson applied to the Commission to the Five Civilized Tribes, pursuant to the act of June 10, 1896, for the enrollment of himself, his wife, and children, with the exception of a daughter, Mary M. McNeese, who made a separate application for herself, her husband, a white man, and their children. The Commission denied Thompson's application, and also that of his daughter. No appeal was taken from these judgments, and it is contended, on behalf of the nation, that under the act of June 10, 1896, they were final and conclusive against the right of these parties to be enrolled.

The claimants, however, rely upon the fact that their names appear upon the tribal roll prepared in pursuance of the Choctaw acts of September 18 and October 30, 1896.

In my judgment, the action of the Commission, under the act of June 10, 1896, not having been appealed from, was final and conclusive against the right of these parties to be

admitted to citizenship, and the Choctaw Nation, even if it attempted to do so, had no right thereafter to admit them. It will be observed that the act of June 10, 1896, provided that applications should be made to the Commission within three months after the passage of the act, and that the Commission should decide all such applications within ninety days after they were made; that the rolls of citizenship of the several tribes as then existing were confirmed, and "any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof;" and that "if the tribe or any person be aggrieved with the decision of the tribal authorities or the Commission provided for in this act, it or he may appeal from such decision to the United States District Court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final."

As I read this act, it authorized application to be made either to the Commission to the Five Civilized Tribes or the "legally constituted court or committee" of such tribes, with a right of appeal by the party aggrieved by the decision of either to the United States Court. Therefore, and in view, also, of the fact that the act contemplated contemporaneous action by the Commission and the tribal courts, I think it clear that the provision that "any person who shall claim to be entitled to be added to said rolls [the existing rolls of the tribe] as a citizen of either of said tribes whose right thereto has either been denied or not acted upon," had reference to a previous denial or failure to act of the tribal authorities, and not to the subsequent action or non-action of the Commission, the tense of the verbs "has either been denied or not acted upon," not "shall be denied or not acted upon" -indicating that past action or non-action was referred to. Prior to the passage of this act the Commission had no jurisdiction of these citizenship matters.

When, therefore, as here, the claimant had applied to the Commission to be admitted and enrolled, and his application denied, his only remedy, under the act in question, lay in an appeal to the United States court. It is true Thompson claims to have received no notice of the denial of his application by the Commission, but that is not a valid excuse.

But aside from this question of jurisdiction in the Choctaw Nation to admit persons to citizenship who had been denied by the Commission, it appears that the nation never undertook to authorize the admission or enrollment of these parties, and that, in any aspect of the case, they were enrolled without authority of law and their names should, in pursuance of the mandate in the act of Congress of June 28, 1898, be eliminated from the tribal rolls.

The Choctaw Nation does not appear to have proceeded under the authority of the act of Congress of June 10, 1896, authorizing the establishment by the several tribes of a court or committee for the purpose of passing upon applications for citizenship as provided therein. It was not until September 18, 1896, ten days after the expiration of the period in which applications for citizenship were to be submitted to the "legally constituted court or committee" of the tribes under the act of June 10, 1896, that the Choctaw council passed the act above referred to. That act provided for the appointment of census commissioners in each county, with authority "to enroll all *recognized* citizens of the Choctaw Nation by blood, intermarriage, and adoption who are recognized as citizens of the Choctaw Nation under the treaties, constitution, and law of the said nation." It further provided that "the rolls when completed by said commissioners shall be certified to by said commissioners and delivered to the principal chief of the Choctaw Nation on or before the twentieth day of October, 1896, to be revised and approved by the next general council of the Choctaw Nation."

It is manifest that this act conferred no power upon such commissioners to admit any person to citizenship, but only to enroll "recognized citizens." Yet in virtue thereof one of the county committees assumed to pass upon a petition prepared by Thompson's attorney, under date of August 1,

1896, and addressed to the general council of the Choctaw Nation, "at its regular session October 1896," praying that "all rights, privileges, and immunities of the Choctaw Nation" be granted to himself, his wife, family, and certain other relatives, "and they be enrolled with the legal citizenship of said nation."

This petition does not appear ever to have been presented to the Choctaw council or referred by any competent authority to the committee which assumed to pass upon it. Upon its back is the following indorsement:

"William C. Thompson, together with the names appearing on the face of the within application, lineal descendants of Margaret McCoy, are hereby recognized and admitted to the citizenship of the Choctaw Nation or tribe of Indians by the legally constituted Choctaw census commission duly assembled at Kiowa, Ind. T., this the 8th day of October, 1896, upon the testimony of Henry Perkins, Mrs. Lavinia Franklin, they being enrolled Choctaw Indians by blood. The within names, parties not being present, were passed for further enrollment.

"A. G. FOLSOM,
"*Secretary of Census Committee.*"

This was a manifest attempt to exercise an authority not delegated to the committee.

On October 30, 1896, the Choctaw council, at its regular session, passed an act creating three commissions, one from each district, one member of each of which to be designated as "chief commissioner," "to make a complete roll of the citizens of the Choctaw Nation." By that act it was made the duty of said commissions "to examine the rolls made by the commissions under the act of September 18, 1896, and also to expunge from said rolls of September 18, 1896, the names of all persons whom they shall adjudge not to be citizens." It was further provided:

"The Commission shall enroll as citizens all who come under any of the following heads, and all such persons are hereby declared citizens of the Choctaw Nation:

"I. All Choctaws by blood born and raised in the Choctaw Nation.

"II. All Choctaws by blood who have been admitted to citizenship by the general council and now residents of the nation."

* * * * *

It was provided that "at the expiration of the time allowed the commissions in each district, the chief commissioners shall meet at Tushka Homma at their earliest convenience, and not later than the first Monday in December, 1896, and shall revise the rolls made by their respective district commissions during the succeeding ten days after they meet." The chief commissioners were authorized to "enroll the name of any citizen who for any good cause failed to appear before the district commissions." It was further provided that "the roll as completed and signed by the chief commissioners, when approved by the principal chief, shall be the legal and authorized roll of citizens of the Choctaw Nation."

These parties were enrolled by the revisory board, but that their enrollment was unauthorized is clear. The act just referred to only authorized the enrollment of Choctaws by blood who were "born and raised" in the Choctaw Nation or had "been admitted to citizenship by the general council." The applicants possessed neither of these qualifications. According to his own statement, William C. Thompson was not raised in the Choctaw Nation, having been taken to Mississippi shortly after his birth, and returning only once during his boyhood for about a year. It is further stated that he remained in Mississippi until the war, when he went to Texas, not returning again to the Choctaw Nation until 1887. He had never been "admitted to citizenship by the general council." His wife and children could claim no greater rights than he possessed. The other applicants named in his petition were descendants of his brother, who was born in Mississippi and whose record appears to be otherwise about the same as William C. Thompson's.

Moreover, it appears from the opinion of the Assistant Attorney-General for the Interior Department, of March 24, 1905, in the case of Mary Elizabeth Martin, that on July 17, 1897, the principal chief of the Choctaw Nation advised the Commission to the Five Civilized Tribes that he had refused

to approve the last revised roll made in accordance with the act of October 30, 1896, because he was satisfied there were some names thereon "that have been registered through fraud or misrepresentation." As such approval was necessary in order to make the roll so prepared "the legal and authorized roll of citizens of the Choctaw Nation," it would seem that in no aspect of the case could these parties be said to be lawfully admitted and enrolled.

It further appears that these applicants, or some of them, including William C. Thompson, applied in 1900 to the Commission for the Five Civilized Tribes for identification as Mississippi Choctaws under the following provision of section 21 of the act of June 28, 1898:

"Said Commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end they may administer oaths, examine witnesses, and prepare all other acts necessary thereto and make report to the Secretary of the Interior."

Article 14 of the treaty of September 7, 1830 (7 Stat., 335), provided:

"ART. XIV. Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent within six months from the ratification of this treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands, intending to become citizens of the States, for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity."

The only evidence adduced in any way tending to show a compliance with the terms of this article were statements to the effect that William C. Thompson's grandfather applied for land under the treaty of 1830, but was refused by the Indian agent. Congress, however, by the acts of March 3, 1837, and August 23, 1842 (5 Stat., 180, 513), appointed commissioners for the purpose of adjusting claims of this kind, and there was no evidence to the effect that the ancestors of the claimants had endeavored to comply with the provisions of those acts, or received patents or certificates for land as therein provided for. The Commission properly held, therefore, that it was impossible to identify the applicants as Mississippi Choctaws.

Upon the whole case, it seems to me clear that these applicants, and those claiming intermarried rights with them, should be denied enrollment.

The other cases consolidated with this are of a similar nature, and under the views above stated the parties referred to therein are, in my judgment, not entitled to be enrolled.

5. THE CASE OF RICHARD B. COLEMAN ET AL.

The enrollment of the parties referred to in this case depends upon the effect to be given to the following act of the general council of the Choctaw Nation, passed November 8, 1889:

"An act to establish the citizenship of R. B. Coleman, his wife, and their children.

"SEC. 1. *Be it enacted by the general council of the Choctaw Nation assembled*, That Richard Benjamin Coleman and his wife, Eva Coleman, and their children, as follows: Richard St. Clair, age 15 years; Ida Clay, age 13; Bennetta, age 11; Bettie Withers, age 9; Henry Allen, age 6; Willie Norma Coleman, age 4 years, are hereby admitted to citizenship in the Choctaw Nation, with rights, privileges, and immunities, and that this act shall take effect and be in force from and after its passage."

It is contended that this act was procured by fraud and bribery, and that therefore the names of Coleman and his family should be eliminated from the tribal rolls upon

which they appear, under the act of Congress of June 28, 1898, which provides:

"Said Commission is authorized and directed to make correct rolls of citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto * * *."

The Commission held that they had no authority to go behind the act of the Choctaw council referred to, but in an informal opinion rendered you December 7, 1904, Acting Attorney-General Day, after quoting the above provision, said:

"It appears to me the above-quoted provisions of the statute impose upon the Commission to the Five Civilized Tribes the duty and gave it the power to determine whether any name appearing upon a tribal roll was placed there by fraud or without authority of law, and that the mere fact that such enrollment was by virtue of an act of the national council is not sufficient to preclude an inquiry. An act of the council should be treated with respect as prima facie valid and efficacious, and nothing done as the result thereof should be lightly set aside; but if it *clearly* appears that the act was procured by deliberate fraud and perjury I do not think that Congress intended that benefits thereunder should be enjoyed."

Mr. Day did not pass upon the facts of this case. Subsequently, the Assistant Attorney-General for the Interior Department, upon a consideration of the record, held that it did not clearly appear therefrom that the act in question had been fraudulently procured.

In my judgment the record in this case clearly shows deliberate fraud on the part of Richard B. Coleman in procuring the passage of the act admitting him to citizenship. It appears that Coleman came into the Choctaw Nation about 1880. In 1887 he made application to the citizenship committee of the Choctaw council for admission as a citizen by blood, representing by himself and witnesses he brought before the committee that his father was a Choctaw boy named Frank Coleman, the son of a John Coleman and Chap-

ponia, a full-blood Choctaw, who had lived in Mississippi with his parents prior to the migration in 1830. The boy Frank, it was testified, had been sent to Kentucky to school and nothing afterwards heard of him.

The testimony adduced on behalf of the nation before the Commission to the Five Civilized Tribes shows that the father of Coleman was Francis S. Coleman, a son of a Francis Coleman who was born and raised in Orange County, Va., and was not a Choctaw. That testimony was given in the form of a deposition by Mrs. Harriet Henry, a sister of Francis S. Coleman, and R. L. Coleman, a nephew, residing at Columbia, Mo. The identity of Francis S. Coleman with the father of the applicant appears from the fact testified to by the applicant as well as the two witnesses just referred to, that he married Ann Elizabeth Bedford, the daughter of John Bedford, in Kentucky, and the testimony of all parties that Francis S. Coleman went to Denton, Tex., and died there. Although duly advised as to the intention of the attorneys for the Choctaw Nation to take this testimony, no effort was made by Coleman or his attorney to file cross interrogatories or in any way rebut it, but they confined themselves to an endeavor to have the testimony stricken from the records as not having been taken in accordance with law. The authority of the Commission to take the testimony in this way is clear, under the act of June 28, 1898 (30 Stat., 495, 503), which provides:

"Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls."

This testimony was further enforced by another deposition of said R. L. Coleman, taken by Commissioner Tams Bixby, in which R. L. Coleman stated further that he knew the applicant, Richard B. Coleman: that he was his cousin. A motion was likewise made to strike this testimony from the record, because taken without notice to the applicant, but it was overruled by the Commission, who held that under the authority of the above act they could take such measures

as they deemed necessary to satisfy themselves as to the justice of the applicant's claim. I do not think it is shown that they abused their discretion in this matter.

It appears that the application of Richard B. Coleman to be enrolled as a citizen by blood of the nation, upon the grounds above stated, was passed over by the citizenship committee of the council in 1887; taken up again in 1888, and a bill of rejectment passed by the committee or the council; renewed at the session of 1889, and a bill of admission introduced into the House of Representatives, which was rejected, and then a new bill introduced and enacted into the law above quoted.

I think it sufficiently appears from the testimony in this case, particularly that given by and on behalf of the applicant himself, that the council in admitting him and his family to citizenship did so upon the strength of the testimony adduced by him before the committee on citizenship that he was a Choctaw by blood, descended as he represented. It is to be observed that he and his family all claim that he was admitted as a Choctaw by blood.

Some testimony was introduced for the purpose of showing that Coleman had bribed one Roebuck, the member of the Council who introduced the second bill, but the evidence on that point is not sufficient to establish the fact.

In October, 1898, the general council of the Choctaw Nation passed an act repealing the act of November 8, 1889, admitting Coleman and his family to citizenship. This act was, however, disapproved by President McKinley, upon the recommendation of the Secretary of the Interior, under the authority of the act of Congress of June 28, 1898, which required the approval of the President to all acts of the Choctaw and Chickasaw nations in any manner affecting the lands of the tribes.

Although this act was thus invalidated it may fairly be taken to indicate the sense of the nation at that time that Coleman was improperly admitted. The reason for its disapproval does not appear, but it might reasonably have been rejected on the ground that by the act of June 28, 1898, the work of making up the rolls of citizenship and eliminating therefrom

those placed thereon by fraud was committed entirely to the Commission to the Five Civilized Tribes.

It is to be observed that Commissioner Bixby, who was the only commissioner who considered this case on its merits, was "clearly of the opinion from such evidence as has been presented to this Commission that the evidence presented to and acted upon by the citizenship committee of the Choctaw general council, which passed upon the petition of these applicants, and upon which evidence their admission to Choctaw citizenship was based, was fraudulent, false, and misleading."

In my opinion, these parties should be stricken from the rolls.

6. THE CASE OF ETHEL PIERSON.

This case presents the question of your authority to enroll the children of Choctaw freedmen who were minors living March 4, 1906. The decision of this question turns upon the construction to be given to section 2 of the act of April 26, 1906 (34 Stat., 137), as amended by the act of June 21, 1906 (34 Stat., 342).

The act referred to originally provided:

"SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by Act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and reenacted, and after the expiration of nine months from the

date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this Act as to allotments heretofore made, no contest shall be instituted against such allotment: *Provided*, That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States."

The amendatory act provided (34 Stat., 341–2):

"That section two of the Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby, amended by striking out thereof the words "*Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided further*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation whose cases are now pending in the Supreme Court of the United States." And insert in said Act in lieu of the matter repealed, the following: *Provided further*, That nothing herein shall be construed so as hereafter to permit any person to file an application for enrollment or to be entitled to enrollment in any of said tribes, except for minors the children of Indians by blood, or of freedmen members of said tribes, or of Mississippi Choctaws identified under the fourteenth article of the treaty of eighteen hundred and thirty, as herein otherwise provided, and the fact that the name of a person appears

on the tribal roll of any of said tribes shall not be construed to be an application for enrollment."

In the agreement with the Choctaw and Chickasaw nations ratified by the act of July 1, 1902 (32 Stat., 641), it was provided (paragraphs 1 and 3) that the words "member" or "members" and "citizen" or "citizens," "whenever used in this agreement, shall be held to mean members or citizens of the Choctaw or Chickasaw tribe of Indians in Indian Territory, not including freedmen."

The Commissioner to the Five Civilized Tribes, in passing upon this case, held that, in view of the above definition, the act of April 26, 1906, as amended, was not intended to apply to the children of freedmen in the Choctaw and Chickasaw nations, but only to those of the Cherokee and Creek nations.

There would be some force in the argument that minors the children of freedmen members of the Choctaw Nation were not included in the act of April 26, 1906, if it were not for the proviso substituted by the amendatory act of June 21, 1906. That proviso was, as the Commissioner said, "in the nature of a construction by Congress of the meaning intended to be conveyed by the section as originally enacted." It says, in so many words, that minors the children of freedmen members of said tribes (referring to all of the tribes, which are separately named in the preceding part of section 2, among them the Choctaw and Chickasaw tribes) may be enrolled. This definition settles the doubt that otherwise might have arisen as to the children of freedmen members of said tribes, as well as the children of Mississippi Choctaws. If, therefore, the Choctaw freedmen are members of said nation, the right of their children to be enrolled can not be questioned.

The Choctaw freedmen were adopted by an act of the general council of the nation approved May 21, 1883, entitled "An act to adopt the freedmen of the Choctaw Nation," which provided (Report of Commissioner of Indian Affairs, 1884, p. XLV):

"Whereas by the third and fourth articles of the treaty between the United States and the Choctaw and Chickasaw nations, concluded April 28, 1866, provision was made for

the adoption of laws, rules, and regulations necessary to give all persons of African descent resident in said nations at the date of the treaty of Fort Smith, September 13, 1865, and their descendants, formerly held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, 40 acres each of the lands of said nations on the same terms as Choctaws and Chickasaws, to be selected on the survey of said lands; until which said freedmen shall be entitled to as much land as they may cultivate for the support of themselves and families; and

"Whereas the Choctaw Nation adopted legislation in the form of a memorial to the United States Government in regard to adopting freedmen to be citizens of the Choctaw Nation, which was approved by the principal chief November 2, 1880, setting forth the status of said freedmen and the inability of the Choctaw Nation to prevail upon the Chickasaws to adopt any joint plan for adopting said freedmen, and notifying the United States Government of their willingness to accept said freedmen as citizens of the Choctaw Nation in accordance with the third and fourth articles of the treaty of 1866 as a basis; and

"Whereas a resolution was passed and approved November 5, 1880, authorizing the principal chief to submit the aforesaid proposition of the Choctaw Nation to adopt their freedmen to the United States Government; and

"Whereas a resolution was passed and approved November 6, 1880, to provide for the registration of freedmen in the Choctaw Nation, authorizing the principal chief to appoint three competent persons in each district, citizens of the nation, whose duty it shall be to register all freedmen referred to in said third article of the treaty of 1866 who desire to become citizens of the nation in accordance with said treaty, and upon proper notification that the Government of the United States had acted favorably upon the proposition to adopt the freedmen as citizens, to issue his proclamation notifying all such freedmen as become

are applicable to imported tea meeting [illegible] the tea act of March 2, 1897."

The tea inspection act of 1897 is a [illegible] solely to the importation of tea. It p[illegible] retary of the Treasury shall annually [illegible] tea experts, who shall prepare and [illegible] samples of tea, and that, upon the re[illegible] board, he "shall fix and establish [illegible] purity, quality, and fitness for consu[illegible] teas imported into the United States." [illegible] ful to import into the United States [illegible] ferior to the standards so provided, [illegible] for the examination of all import[illegible] house by an examiner to determine [illegible] the standards so fixed, and for re[illegible] appraisers in case of a protest aga[illegible] examiner. (29 Stat., 604.)

The food and drugs act of 1906, [illegible] general act relating to all adultera[illegible] or drugs and is not limited in its [illegible] of their importation. It defines [illegible] cases in which any food or drug shall [illegible] terated or misbranded, and makes [illegible] ture any such adulterated or [illegible] any Territory or in the District of [illegible] duce the same into any State or Territory [illegible] of Columbia, either through interstate [illegible] or to ship the same to any foreign [illegible] to general authority given the Secretary [illegible] of Agriculture, and of Commerce and [illegible] form rules and regulations for carrying [illegible] of the act, including the collection [illegible] and drugs, for examination in the [illegible] the Department of Agriculture, [illegible] is provided, in reference to imported [illegible] Agriculture shall, upon information [illegible] food and drugs being imported [illegible] that if upon examination any such article [illegible] adulterated or misbranded [illegible] health, or of a kind forbidden [illegible]

TEA INSPECTION ACT—FOOD AND DRUGS ACT—CONSTRUCTION.

There is no such repugnancy between the special tea inspection act of March 2, 1897 (29 Stat., 604), and the general food and drugs act of June 30, 1906 (34 Stat., 768), as to prevent them, generally speaking, from standing together.

The food and drugs act does not appear to have been intended as a substitute for the earlier statute in the matter of the importation of tea, but both statutes are cumulative in so far as the importation of tea is concerned, and both should be given effect.

An importation of tea is, therefore, subject to the provisions of both acts—that is, it must comply with the standards established by the Secretary of the Treasury under the tea inspection act, and must also stand the tests in reference to adulteration and misbranding imposed by the food and drugs act.

Imported tea, although meeting the requirements of the tea inspection act of 1897, is still subject to the provisions of the food and drugs act of 1906 regarding adulteration, labeling, misbranding, and guaranty.

In case of repugnancy between any specific provisions of the two statutes, the provisions of the food and drugs act would prevail to the extent of that repugnancy, and any conflicting provisions of the tea inspection act would, to that extent, be impliedly repealed.

In the absence of an express repeal of an earlier statute by a later one covering the same subject, effect should be given to both unless there is a positive repugnance between them, in whole or in part, in which case the earlier statute is repealed by implication to the extent of such repugnancy, or unless the provisions of the latter statute cover the whole subject of the earlier law and are plainly intended as a substitute therefor, in which case there is likewise a repeal of the earlier statute by implication.

DEPARTMENT OF JUSTICE,
February 23, 1907.

SIR: I have the honor to acknowledge receipt of your letter of February 8 in reference to the tea inspection act of March 2, 1897, and the food and drugs act of June 30, 1906, in which, as a preliminary to your action upon certain cases arising out of the administration of the laws governing the importation and examination of teas, you request my opinion "upon the question of law whether the provisions of the food and drugs act of June 30, 1906, regarding adulteration, labeling, misbranding, and guaranty,

are applicable to imported tea meeting the requirements of the tea act of March 2, 1897."

The tea inspection act of 1897 is a special act, relating solely to the importation of tea. It provides that the Secretary of the Treasury shall annually appoint a board of tea experts, who shall prepare and submit to him standard samples of tea, and that, upon the recommendation of this board, he "shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States." It is made unlawful to import into the United States any tea which is inferior to the standards so provided, and provision is made for the examination of all imports of tea at the customhouse by an examiner to determine their conformity to the standards so fixed, and for re-examination by general appraisers in case of a protest against the finding of an examiner. (29 Stat., 604.)

The food and drugs act of 1906, on the other hand, is a general act relating to all adulterated or misbranded food or drugs and is not limited in its prohibitions to the matter of their importation. It defines specifically the various cases in which any food or drug shall be deemed to be adulterated or misbranded, and makes it unlawful to manufacture any such adulterated or misbranded food or drug in any Territory or in the District of Columbia, or to introduce the same into any State or Territory, or the District of Columbia, either through interstate or foreign commerce, or to ship the same to any foreign country. In addition to general authority given the Secretaries of the Treasury, of Agriculture, and of Commerce and Labor, to make uniform rules and regulations for carrying out the provisions of the act, including the collection of specimens of food and drugs, for examination in the Bureau of Chemistry of the Department of Agriculture, or under its direction, it is provided, in reference to imports, that the Secretary of Agriculture shall, upon his request, receive samples of food and drugs being imported or offered for import, and that if upon examination any of such articles appear to be adulterated or misbranded, or otherwise dangerous to health, or of a kind forbidden entry or restricted sale in

the country of its manufacture or export, or otherwise falsely labeled, it shall be refused admission into this country. (34 Stat., 768.)

This food and drugs act contains no repealing clause whatever, and does not refer to either the tea-inspection act or any of the other earlier statutes regulating the admission of other food and drugs, such as the act of June 26, 1848, providing for the examination at the custom-house of drugs and medicines with reference to their quality, purity, and fitness for medical purposes. (Rev. Stat., sec. 2933 et seq.)

Comparing the tea inspection act and the food and drugs act, it will be seen that not only is the one special and the other general, but that, even in reference to the importation of teas, the tea inspection act on the one hand contains no restrictions in reference to the misbranding of teas, and on the other goes further than the food and drugs act in regard to standards of admission, and authorizes the Secretary of the Treasury to establish standards which are not limited to the purity of the tea, but extend broadly to matters of quality and fitness for consumption.

In *Buttfield* v. *Stranahan* (192 U. S., 470, 496), in which the constitutionality of the tea inspection act was upheld, and in which the importation was a pure green tea of low grade that had been rejected as inferior to standard in cup quality alone, that is, in taste and flavor, it was said that the statute, when properly construed, "expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so, because of their inferior quality."

It thus appears that under the tea inspection act the Secretary of the Treasury may prescribe a standard for the quality of tea whose effect will be to exclude from admission tea which, although in no wise adulterated or misbranded within the meaning of the food and drugs act, is, nevertheless, of such inferior quality as, in his opinion, to require exclusion, while, on the contrary, importation of teas may fall within the prohibition of the food and drugs act, as being deemed either adulterated or misbranded within the meaning of the food and drugs act, although

fully complying with the standards of admission that may be established by the Secretary of the Treasury.

The question then arises as to what extent, if any, these two acts can stand together. In the absence of an express repeal of an earlier statute by a later one covering the same subject, the rule is well settled that, as repeals by implication are not favored, effect shall be given to both statutes, unless there is a positive repugnancy between them, in whole or in part, in which case the earlier statute is repealed by implication to the extent of such repugnance; or, unless the provisions of the later statute cover the whole subject-matter of the earlier and are plainly intended as a substitute therefor, in which case there is likewise a repeal of the earlier statute by implication. (*Wood* v. *United States*, 16 Pet., 342; *Daviess* v. *Fairbairn*, 3 How., 636; *United States* v. *Tynen*, 11 Wall., 88; *Henderson's Tobacco*, 11 Wall., 652; *State* v. *Stoll*, 17 Wall., 425; *Fabbri* v. *Murphy*, 95 U. S., 191; *Ex parte Crow Dog*, 109 U. S., 556; *Chew Hoeng* v. *United States*, 112, U. S., 536.)

In *Wood* v. *United States*, 16 Pet., 342, 362, it is said, in reference to the question of the repeal of an earlier statute by implication: "It is not sufficient * * * that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary." And in *State* v. *Stoll* (17 Wall., 425, 431) the rule is thus stated: "If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be."

Further, in *Ex parte Crow Dog* (109 U. S., 556, 570), it is said, in reference to the rule that a later general act is not to be construed as repealing a previous special act, except by express provision or positive repugnancy:

"The rule is *generalia specialibus non derogant*. 'The general principle to be applied,' said Bovill, C. J., in *Thorpe* v. *Adams* (L. R. 6 C. P., 135), 'to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the

subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in *Fitzgerald* v. *Champenys* (30 L. J. N. S. Eq., 782; 2 Johns & Hem., 31–54), 'that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'"

Applying these principles of construction to the two acts in question, I am of the opinion that there is no such repugnancy between the special tea-inspection act of 1897 and the general food and drugs act of 1906 as to prevent them, generally speaking, from standing together; that the provisions of the tea-inspection act cover in respect to the importation of tea matters not embraced within the food and drugs act, while the food and drugs act in turn imposes restrictions upon the importation of all food and drugs, including tea, which are not necessarily embraced in the tea-inspection act; that the food and drugs act does not plainly appear to have been intended as a substitute for the earlier statute in the matter of the importation of tea; but that, generally speaking, the two statutes are cumulative in so far as the importation of tea is concerned and should both be given effect; and hence, that an importation of tea is now subject to the provisions of both of these acts, that is to say, it must comply with the standards established by the Secretary of the Treasury under the tea-inspection act and must also stand the tests in reference to adulteration and misbranding imposed by the food and drugs act. I am therefore of the opinion, to reply specifically to your question, that imported tea, although meeting the requirements of the tea-inspection act of 1897, is still subject to the provisions of the food and drugs act regarding adulteration, labeling, misbranding, and guaranty.

It, of course, follows from what has been said that, if in the administration of these laws there should develop a repugnancy between any specific provisions of the two statutes, to the extent of such repugnancy the provisions of the

food and drugs act would prevail, and any conflicting provisions of the tea-inspection act would, to such extent, be impliedly repealed.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

CHEROKEE ENROLLMENT—JOHN W. GLEESON.

John W. Gleeson, a white man, intermarried into the Cherokee Nation in 1873, and his name appears on the Cherokee authenticated tribal roll of 1880. He applied to the Commission to the Five Civilized Tribes in 1901 for enrollment, which application was finally denied February 9, 1907, upon the authority of the case of *Red Bird* v. *United States* (203 U. S., 76), he having abandoned his wife in 1878. Section 667 of the Cherokee constitution also provides that every intermarried person who abandons his wife shall thereby forfeit every right and privilege of citizenship in that nation: *Held*, that the applicant was entitled to enrollment under section 21 of the act of June 26, 1898 (30 Stat., 495, 502), which specifically directs the Commission "to enroll all persons now living whose names are found on said roll."

The authority given the Commission in the act of June 26, 1898, to eliminate from the tribal rolls those placed thereon by fraud or without authority of law is expressly limited to "any other rolls," meaning any other than the roll of 1880, which was confirmed.

The case of *Red Bird* (203 U. S., 76) distinguished.

DEPARTMENT OF JUSTICE,
February 26, 1907.

SIR: I beg to acknowledge the receipt of your letter of the 25th instant, requesting my opinion upon the Cherokee enrollment case of John W. Gleeson. It appears from the record in this case that Gleeson applied to the Commission of the Five Civilized Tribes on February 21, 1901, to be enrolled as a citizen by intermarriage in the Cherokee Nation. Upon the testimony adduced before him at that time, Commissioner Needles held:

"The name of John W. Gleeson appears upon the 1880 authenticated roll as well as the census roll of 1896 as an intermarried citizen. He makes satisfactory proof of his

marriage to his wife, Clarry Crittendon, a Cherokee citizen by blood, in the year 1873. The testimony develops the fact that he separated from his wife after living with her some three or four years, but that separation occurred before 1880. Since 1880 he has never been remarried; consequently said John W. Gleeson will be duly listed for enrollment as a Cherokee citizen by intermarriage."

Some further testimony was taken in this case on October 15, 1902, by which it appeared that Gleeson had lived in the Cherokee Nation all the time since 1880.

January 17, 1907, this case appears to have been again taken up by the Commissioner to the Five Civilized Tribes. At the hearing then had the Cherokee Nation, by its attorney, introduced testimony tending to show that Gleeson, after living with his wife two or three years, had abandoned her. Gleeson, it appears, died November 30, 1903, bequeathing all his property including the allotment in the Cherokee Nation, which he had theretofore selected, to the Catholic Church at Moskogee.

On February 9, 1907, the Commissioner to the Five Civilized Tribes rendered the following decision:

"The records of this office show: That at Muscogee, Indian Territory, February 21, 1901, application was received by the Commission to the Five Civilized Tribes, for the enrollment of John W. Gleeson as a citizen by intermarriage of the Cherokee Nation. Further proceedings in the matter of said application were had at Muscogee, Indian Territory, October 15, 1902, and January 17, 1907.

"The evidence in this case shows: That the applicant herein, John W. Gleeson, is a white man, and neither claims nor possesses any right to enrollment as a citizen of the Cherokee Nation, other than such right as he may have acquired by virtue of his marriage, January 21, 1873, to one Katie Gleeson, née Crittenden, who was at the time of said marriage a recognized citizen by blood of the Cherokee Nation. Said Katie Gleeson was a daughter of one Moses Crittenden, a native Cherokee, who is identified on the Cherokee authenticated tribal roll of 1880, Goingsnake district No. 331, marked 'dead.' The said

Katie Gleeson can not be identified on the Cherokee authenticated tribal roll of 1880. It is further shown that about the year 1878 said John W. Gleeson abandoned the said Katie Gleeson and thereafter refused to live with her. Section 667 of the Cherokee constitution provides: 'Every person who has lawfully married under the provisions of this act, and afterwards abandons his wife, should thereby forfeit every right and privilege of citizenship of this nation.'

"It is, therefore, ordered and adjudged: That in accordance with the decision of the Supreme Court of the United States, dated November 5, 1906, in the case of *Daniel Red Bird et al.* v. *The United States*, Nos. 125, 126, 127, 128, the said applicant, John W. Gleeson, is not entitled, under the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stat., 495), to enrollment as a citizen by intermarriage of the Cherokee Nation, and his application for enrollment as such is accordingly denied."

In the case of *Red Bird* v. *The United States* (203 U. S., 76) the Supreme Court affirmed the decree of the Court of Claims, which held that white persons who intermarried in the Cherokee Nation prior to November 1, 1875, were entitled to share in the distribution of the tribal property and to be enrolled for such purpose. The Supreme Court also affirmed that portion of the decree of the Court of Claims which held that white men who, having intermarried Cherokee women, subsequently abandoned their Cherokee wives were not entitled to participate in the distribution of the tribal property or to be enrolled for such purpose. It will be observed that the decision of the Commissioner is based upon the fact, found by him, that Gleeson abandoned his wife. The testimony is conflicting upon this point, but the matter is immaterial from my point of view, because I think that, under the law, the Commissioner had no authority to go behind the Cherokee roll of 1880 upon which the name of Gleeson appeared.

Section 21 of the act of June 28, 1898 (30 Stat., 495, 502), provides:

"That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws."

It will be observed that the act of June 10, 1896, confirmed all the rolls of citizenship of the several tribes as then existing, and that the act of June 7, 1897, provided that the words "rolls of citizenship," as used in the act of June 10, 1896, should be construed to mean "the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the Commission under the act of June tenth, eighteen hundred and ninety-six."

The act of June 28, 1898, limits the confirmation of Congress to the Cherokee roll of 1880, and specifically directs the Commission "to enroll all persons now living whose names are found on said roll." The authority given the Commission to eliminate from the tribal rolls those placed

thereon by fraud or without authority of law is also expressly limited to "any other rolls," meaning any other than the roll of 1880, which was confirmed. It seems to me clear, therefore, that if due effect is to be given to the language used by Congress in this act, the Commissioner was bound to enroll Gleeson, since his name appeared on the Cherokee roll of 1880, and he was a resident of the Nation at the time of the passage of the act of June 28, 1898, as required therein.

In the *Red Bird* case the Supreme Court held that the confirmation given to the roll of 1880 "was not intended to create any rights which citizens of the Cherokee Nation had not before enjoyed, but merely to furnish the basis for making up the roll of citizens." By this it evidently meant that although a person was upon that roll he was not, because of that fact alone, entitled to share in the distribution of the tribal property. But where, as here, a person belonged to a class entitled to share in the distribution of the tribal property, and the only question was as to whether he had forfeited his citizenship, the fact that his name appeared on such confirmed roll must be held to remove that question from the realm of controversy, he being a resident of the nation as required by the act of June 28, 1898. To hold that the Commission could go behind the roll of 1880 and investigate the right to citizenship of persons whose names appeared thereon would be to put that roll on exactly the same footing as the other rolls of the tribe which were not confirmed, but expressly left open to investigation.

As I understand it, that part of the decree of the Court of Claims in the *Red Bird* case, affirmed by the Supreme Court, in regard to "married out and abandoned whites" has no reference to a case of this kind.

I am therefore of the opinion that Gleeson was entitled to be enrolled.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE INTERIOR.

LEGISLATIVE ASSEMBLY OF PORTO RICO—CORPORATIONS.

The legislative assembly of Porto Rico has authority to pass laws setting forth the conditions under which domestic corporations may be organized and foreign corporations may do business there, subject, however, to the exceptions and restrictions contained in the organic act of April 12, 1900 (31 Stat., 77, 83), and the joint resolution of May 1, 1900 (31 Stat., 715), in regard to franchises of a public or quasi-public nature, including all railroad, street railway, telegraph, and telephone franchises, privileges, or concessions.

DEPARTMENT OF JUSTICE,
February 28, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of the 2d instant, inclosing one from the Secretary of State of the same date, and asking my opinion upon the question whether the legislative assembly of Porto Rico can properly pass laws setting forth the conditions under which domestic corporations may be organized and foreign corporations do business there, or whether such power on the part of the assembly is excluded or denied by the grant of power to the executive council by section 32 of the organic act (31 Stat., 77, 83), and the joint resolution of May 1, 1900 (31 Stat., 715).

Section 32 of the act in question is as follows:

"That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: *Provided, however*, That all grants of franchises, rights, and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same."

The joint resolution approved May 1, 1900, is in the words following:

"All railroad, street railway, telegraph and telephone franchises, privileges, or concessions granted under section thirty-two of said act shall be approved by the President of the United States, and no such franchise, privilege, or concession shall be operative until it shall have been so approved. (Sec. 2.)

"That all franchises, privileges, or concessions granted under section thirty-two of said act shall provide that the same be subject to amendment, alteration, or repeal; shall forbid the issue of stock or bonds, except in exchange for actual cash, or property at a fair valuation, equal in amount to the par value of the stock or bonds issued; shall forbid the declaring of stock or bond dividends; and, in the case of public-service corporations, shall provide for the effective regulation of the charges thereof and for the purchase or taking by the public authorities of their property at a fair and reasonable valuation. No corporation shall be authorized to conduct the business of buying and selling real estate or be permitted to hold or own real estate except such as may be reasonably necessary to enable it to carry out the purposes for which it was created, and every corporation hereafter authorized to engage in agriculture shall by its charter be restricted to the ownership and control of not to exceed five hundred acres of land; and this provision shall be held to prevent any member of a corporation engaged in agriculture from being in anywise interested in any other corporation engaged in agriculture. Corporations, however, may loan funds upon real-estate security, and purchase real estate when necessary for the collection of loans, but they shall dispose of real estate so obtained within five years after receiving the title. Corporations not organized in Porto Rico, and doing business therein, shall be bound by the provisions of this section so far as they are applicable." (Sec. 3.)

There can be no doubt that the general grant of power to the legislative assembly is broad enough to include the matters mentioned in the letter from the Secretary of State, unless it is restricted by the proviso that "all

grants of franchises, rights and privileges or concessions of a public or quasi-public nature shall be made by the executive council." This question is really a very narrow one and depends upon whether the words "of a public or quasi-public nature" qualify "franchises" and "rights" as well as "privileges or concessions," or are restricted in their application to the last two substantives. The attorney- general of Porto Rico, in a carefully prepared opinion which has received due consideration, takes the latter view; but, with all respect to his opinion, I am unable to reach the same conclusion. If all grants of "franchises" must be made by the executive council, then all grants of "rights" must also be made by the executive council, and it is hard to conceive of any form of grant or even any form of legislative action which would not confer "rights" of some sort. This construction would therefore largely, if not altogether, nullify so much of the act as confers legislative authority upon the assembly; and it seems to me clearly inconsistent with the general purpose of the law, which was to confer autonomy as to all matters of local interest upon Porto Rico. The restrictions upon the powers of the local government contained in the same act must be construed with reference to its general purpose.

This construction seems to me also consistent with the language of the joint resolution. In that resolution certain "franchises, privileges, or concessions" clearly of a "public or quasi-public nature" are made, subject to the approval of the President, and then all "franchises, privileges, or concessions granted under section thirty-two of said act" are made subject to certain conditions; and further conditions are imposed upon "public-service corporations," indicating again the purpose of Congress to apply different rules of law to such corporations from those made applicable to corporations generally.

Moreover, the act and resolution must be construed with reference to the conditions existing at the time of their enactment. It is well known that soon after the acquisition of Porto Rico, public attention was attracted to the probability that American capitalists and promoters might obtain opportunities for exploiting the resources of the

island with little regard to the permanent interests of its inhabitants. It was, therefore, believed to be just and right that the people of the island should be protected from the dangers of rapacity and of their own inexperience, so far as their most important public interests were concerned; and Congress accordingly, by section 32, placed in charge of the executive council appointed by the President and by the joint resolution, partly in the President himself, the control of franchises, rights, and concessions of a public or quasi-public nature—that is to say, franchises, etc., concerning railroads, canals, and other things involving duties and powers deemed to be of a governmental or quasi-governmental nature.

In furtherance of this purpose restrictions have been imposed upon the general grant of legislative power contained in section 32 of the act, and further restrictions applicable to corporations constituting public agencies and, in part, to all corporations, are contained in the joint resolution; but, subject to these restrictions, full effect must be given to the grant of legislative power, and it seems to me clear that this includes authority to deal with the affairs of corporations generally, subject only to the limitations expressly provided by Congress. It is undoubtedly true, as stated by the attorney-general of Porto Rico, that the grant of corporate rights in any form may be described as the grant of a "franchise," but it is not necessarily the grant of a franchise "of a public or quasi-public nature;" and in all cases where the corporate powers conferred do not partake of that nature, I consider that the subject-matter is within the legislative authority of the assembly.

In my opinion, Congress has used apt words to give to the assembly all the legislative power usually possessed by an American legislature, such as those that have been set up in our Territories, with the exceptions made by the grant to the council concerning public and quasi-public franchises, etc., and by the restrictions upon corporate authority contained in the joint resolution of May 1, 1900.

Respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

IMMIGRATION AND CONTRACT LABOR LAWS—STATE IMMIGRATION.

The provisions of the acts of February 26, 1885 (23 Stat., 332), February 23, 1887 (24 Stat., 414), and October 19, 1888 (25 Stat., 566), authorizing the exclusion or deportation of contract laborers, were not repealed by the act of March 3, 1903 (32 Stat., 1213), and immigrants coming to the United States during the years 1904–1906 in violation of the act of 1885 could have been and should have been excluded.

There was, however, no authority to exclude aliens not coming within the prohibition of the law of 1885, although covered by the broader terms of the prohibition in section 4 of the act of 1903, as the latter act contains no provision authorizing the exclusion or deportation of aliens who have been improperly brought to this country.

The right to exclude depended upon the act of 1887, and the right to deport upon the act of 1888, both of which acts were dependent upon the act of 1885, which made the coming of certain classes of aliens into this country unlawful.

The only exception made in the contract-labor laws in favor of States is contained in the act of March 3, 1891 (26 Stat., 1084), and section 6 of the act of 1903, in reference to advertisements printed and published in foreign countries, stating the inducements they offer for immigration.

In the provisions of the act of 1885 and under section 4 of the act of 1903, in dealing with the payment of passage money or other specific assistance to migration of individual aliens, no exception is made in favor of States, and no exception exists, therefore, in favor of any person because he may act as agent of a State.

Congress has the undoubted right to regulate the admission of aliens into the United States, whether as immigrants or otherwise, and to exclude altogether any class of aliens whose entrance it might deem contrary to the general welfare of the Union.

No action by any State or by any officer thereof can operate to impair or nullify the effect of a law of Congress duly enacted upon this subject.

Aliens who came to the United States during the years 1904–1906 at the suggestion and through the instrumentality of an officer of the State of South Carolina, appointed under a statute which expressly permitted him to act as agent for citizens of that State in the procuring of desirable immigrants, which officer, largely or wholly at the expense of such individuals, visited foreign countries and by advertisement, promises of employment, and prepayment of passage, induced a large number of laborers and artisans to migrate to South Carolina, were introduced into the United States in violation of the acts of 1885, 1887, and 1888, and should have been excluded.

Aliens coming to the United States under similar circumstances after the act of February 20, 1907 (34 Stat. 898), becomes effective, would unquestionably be liable to exclusion.

The determination of the existence of the facts justifying the exclusion of immigrants is, in the first instance, vested in the Secretary of Commerce and Labor.

DEPARTMENT OF JUSTICE,
March 6, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of the 26th ultimo, inclosing one from Hon. Benjamin F. Howell, chairman of the Committee on Immigration and Naturalization of the House of Representatives, under date of February 25 last past, to you, in which you are requested, on behalf of that committee, to refer to me, for my opinion, the question as to whether certain aliens, described in a resolution, of which a copy was inclosed, were lawfully admitted into the United States. The resolution, however, describes these aliens only as "foreign laborers" introduced "into the State of South Carolina by one E. J. Watson." To ascertain the circumstances of their introduction it is necessary to refer to a pamphlet, also accompanying the letter of the committee, and which contains Decision No. 111 of the Solicitor of the Department of Commerce and Labor, which appears to have been "published for the information of those interested" on December 26, 1906, by that Department. I shall refer later to the facts set out in this decision with respect to the subject-matter of inquiry. It will, however, conduce to clearness if I state first the general provisions of law relating to the exclusion and deportation of aliens existing at the time when these immigrants were introduced into the United States. The precise date does not appear, but it was evidently after February 23, 1904, and before December 15, 1906; and no material change in the law took place between these dates.

By the original alien contract-labor law of February 26, 1885 (23 Stat., 332), it was made unlawful for any person to prepay the transportation or assist or encourage the importation of any alien, under contract or agreement previously made, to perform labor in the United States (sec. 1),

provided that skilled workmen might be engaged upon any new industry not then established in the United States, if skilled labor for such purpose could not be otherwise obtained (sec. 5). By an amendatory act of February 23, 1887 (24 Stat., 414), it is provided that any immigrants "included in the prohibition" of the contract-labor act should not be permitted to land and should be sent back to the nation whence they came (sec. 8). And, by a further amendment of October 19, 1888 (25 Stat., 566), the Secretary of the Treasury was authorized to cause any immigrant who had been allowed to land contrary to the prohibition of the contract-labor law to be returned within one year after his landing.

By an act of March 3, 1891, "in amendment to the various acts" relative to the immigration and the importation of alien laborers (26 Stat., 1084), it was enacted that certain classes of aliens should be excluded from admission "in accordance with the existing acts regulating immigration," namely: All idiots, insane persons, and other specified classes of aliens, and also any person whose ticket is paid for by another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes," or to the class of contract laborers excluded by the act of February 26, 1885" (sec. 1). And it was further provided that it should be deemed a violation of the act of February 26, 1885, to assist or encourage the importation of any alien by promise of employment through advertisements printed and published in a foreign country, except by States and immigration bureaus of States advertising the inducements they offer for immigration (sec. 3). This act contained no repealing clause, and while it contained no express provision excluding alien contract laborers from admission, on the other hand, it did not purport to repeal any of the excluding provisions of the contract-labor law; but, on the contrary, recognized these provisions as still in force by providing that the payment of an immigrant's passage by another should put upon him the burden of showing affirmatively that he did not belong to the class of contract laborers excluded by the act of 1885, and also by a

provision in section 3, that any alien coming to this country in consequence of a promise of employment through an advertisement should be treated as coming under a contract as contemplated by the act of 1885. It seems clear that this act of 1891 did not repeal any of the former provisions excluding contract laborers from admission, and, after the passage of this act, any contract laborer coming within the terms of the prohibition of either the original act of 1885 or the amendment of 1891 should be denied admission to this country; that is to say, after the passage of that act no alien laborer was entitled to admission whose passage had been prepaid or whose migration had been assisted when he was under previous contract to labor, or who came to this country in consequence of a promise of employment through a foreign advertisement other than that of a State.

The act of March 3, 1903, entitled "An act to regulate the immigration of aliens into the United States" (32 Stat., 1213), embraces provisions relating both to immigration and to contract labor. Section 2, which is the general clause relating to the exclusion of immigrants, provides that the following classes of aliens shall be excluded from admission into the United States: "All idiots, insane persons," and other specified classes; "those who have been, within one year from the date of the application for admission to the United States, deported as being under offers, solicitations, promises, or agreements to perform labor or service of some kind therein; and also any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes;" provided that "skilled labor may be imported, if labor of like kind unemployed can not be found in this country;" and provided further, "that the provisions of this law applicable to contract labor shall not be held to exclude professional actors" and other specially excepted persons. Section 4 of this act makes it unlawful for any person to prepay the transportation or assist or encourage the importation of any alien in pursuance of any offer, solicitation, promise, or agreement made previous to the importation of such alien to perform

labor in the United States. And section 6 makes it unlawful and a violation of section 4 to assist or encourage the importation of any alien by a promise of employment through advertisements printed and published in a foreign country, except by States or Territories, the District of Columbia, or other Federal places advertising the inducements they offer for immigration. By section 36 all inconsistent acts are repealed, with a proviso that the Chinese exclusion acts shall not be thereby affected.

A question of no little intrinsic difficulty, and of great importance, arises as to the effect of this act. It would seem, at first sight, that Congress intended by its enactment to provide for the entire subject of the immigration of aliens into the United States. Section 2 of the act contains no reference to the previously existing laws on the subject, such as was contained in the act of 1891, above cited; and the enumeration in that section of the classes of aliens to be excluded from the United States appears on its face to be exhaustive. These facts suggest very strongly the necessity of an application of the well-established rule of statutory construction, which requires that a legislative enactment covering the entire subject-matter embraced in previous statutes and apparently intended by the legislature to embody the whole law on the subject, repeals, by implication, such preceding enactments, although their provisions may not be inconsistent with those of the new law. The decisions in *Daviess* v. *Fairbairn* (3 How., 636) and *State* v. *Stoll* (17 Wall., 425) illustrate the application of this doctrine. If, however, it is to be applied to the statute under consideration, the result must be that between the date of the latter's approval (March 3, 1903) and the date of the approval of the statute recently enacted (February 20, 1907) no law existed under which aliens coming to this country under contracts of employment could be either excluded or deported for that reason. The right to exclude them depended on the act of 1887; the right to deport them upon the act of 1888. But both of these acts were dependent for their efficacy upon the prior act of 1885, which made the coming of this class of aliens into the United States unlawful, although it did not authorize their exclu-

sion or deportation; but, on the contrary, evidently contemplated that they would remain in this country. The act of 1891 made the payment of the immigrant's passage money by another prima facie proof that he was a contract laborer under the terms of the act of 1885. If all four of these acts were superseded and impliedly repealed by the act of 1903, it would follow that no law was on the statute book subsequent to the approval of the last-mentioned act, which provided for the deportation or exclusion of "contract labor aliens;" for, although that act broadened the provisions making the importation of this class of aliens a crime, and imposed appropriate penalties on those guilty of the offense, it contained no provision authorizing their exclusion from the country or their deportation after they had been introduced. There is, however, one provision in section 2 of the law of 1903 which indicates that Congress contemplated the deportation of aliens under the authority originally conferred by the statute of 1888, and therefore did not intend to repeal in toto all of the previously existing statutes on the subject of the immigration of aliens. This is the provision denying admission to those who within one year previously have been deported "as being under offers, solicitations, promises, or agreements to perform labor or service of some kind therein." If this clause had merely referred to persons deported as being under contracts, promises, or agreements, it might be referable solely to persons deported prior to the passage of this act; but as prior to the passage of this act there was no provision for excluding or deporting persons "under offers or solicitations" of labor, and such persons could not have been previously deported, this phrase is only explainable on the theory that Congress understood that persons coming in pursuance of the offers or solicitations prohibited in section 4 of the act of 1903 were to be thereafter subject to deportation. The force of any argument against the repeal, by implication, which can be fairly drawn from the insertion of this provision is, however, seriously weakened by the fact that the persons coming in pursuance of offers or solicitations prohibited in section 4 of the act of 1903, but not embraced under the terms of the act of 1885, in fact, were

not made subject to deportation by the first-mentioned act, although it is possible, and even probable, that its framers thought they were. Congress used no apt words to subject them to this penalty either in section 2, or in section 4, or in any other section of the act in question; and it may be not unreasonably held that the true inference to be drawn from the provision in question was, not that Congress intended to keep alive the statutes on the same subject previously enacted, but that it passed the law of 1903 under a misapprehension as to its legal effect. I should, therefore, find great difficulty in escaping the conclusion that the provisions of law authorizing the exclusion or deportation of aliens by reason of their coming to the United States under contracts of employment had been repealed by the act of 1903, if it were not that the question in dispute seems to have been determined by judicial authority. This precise point was considered in the deportation case of *In re Ellis* (124 Fed., 637), decided June 25, 1903, in which two aliens—Ellis and Charalambis—who had been denied admission and who were held in custody by immigration authorities, insisted that the act of 1903 had repealed, by implication, all previous laws on the subject, and that there was no law then existing under which they could be deported, although their passage had been paid by others and they came here under contract to perform labor or service. Lacombe, Circuit Judge, after reviewing the statutes and carefully analyzing the act of 1903, held that while section 2 of the act of 1903 was inconsistent with section 1 of the act of 1891 as to all items wherein they differed, it did not operate to remove the barrier to the admission of contract laborers under the contract labor laws. He further says (p. 641):

"But, as was pointed out in *Holy Trinity Church* v. *United States* (143 U. S., 459), in construing these statutes we are to get at the spirit of the statute and the intention of its makers, however inconsistent that may be with the words used. * * *

"The act now under consideration originated in the House of Representatives. When it came to the Senate there was, in the second section (immediately after the

clause 'persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution),' the following: 'Persons whose migration has been induced by offers, solicitations, promises, or agreements, parol or special, express or implied, of labor or work or service of any kind, skilled or unskilled, in the United States.' The Senate amended the House bill by striking out the clause last above quoted, and in several other respects. The House non-concured in the Senate amendments, and the bill went to a conference committee. The committee came into accord as to which amendments should be accepted and which should be withdrawn. This particular amendment was accepted. The House conferees reported to the House that they 'have concurred in the Senate amendment (in line 19, p. 3, sec. 2) striking out the part of the bill relating particularly to the contract labor law, leaving intact the contract labor laws heretofore enacted and now on the statute books; the only variation being that the words 'offers, solicitations, or promises' were substituted for the word 'contracts.'" (Congressional Record, p. 3205.)

Judge Lacombe further held that these petitioners, although expert accountants, were not within the excepted clauses. Both Ellis and Charalambis appealed to the Supreme Court, but subsequently, on a rehearing before the Commissioner of Immigration, the excluding order was reversed—upon what ground does not appear—and the two appeals were dismissed without decision by that court.

In a later case before the Circuit Court of Appeals for the Second Circuit, in which the question was squarely involved, although not discussed by the court or counsel, it seems to have been assumed by all concerned that the exclusions contained in the contract-labor law were not repealed by the act of 1903. This was the case of *Pearson* v. *Williams* (136 Fed., 734), in which the aliens, who had arrived in 1904, had been admitted to entry by the board of inquiry, but thereafter the Secretary of Commerce and Labor had instituted new proceedings for a retrial to ascertain whether they were here in violation of law as alien contract laborers who had come here under a previous

contract to perform service, all the proceedings being had pursuant to the act of March 3, 1903. The application of the contract-labor law apparently was not denied, the only contention being that the decision of the board of inquiry was final and that the Secretary of Commerce and Labor had no authority to direct the retrial. It was held—Judge Coxe dissenting—that he had such authority, and the petitioners were remanded to the custody of the Commissioner of Immigration. On writs of certiorari, issued by the Supreme court, the judgment of the Circuit Court of Appeals was affirmed. In the opinion by Mr. Justice Holmes in *Pearson* v. *Williams* (202 U. S., 281), after stating the facts that the petitioners had landed on February 1, 1904, it is said that "the only question is whether the Secretary had the right to direct the second hearing and to make the order under section 21 of the act of March 3, 1903, chapter 1012, when there had been an inquiry at the time of the petitioners' landing and a decision in their favor under section 25." Apparently it was not suggested either by the court or by counsel that the act of 1903 had repealed the exclusions of the contract-labor law. While these authorities are not, perhaps, so clearly decisive as to bind a court of last resort in passing upon this question, nevertheless they seem to me sufficient to fix the law for this Department, and I reach the conclusion that the provisions of the several statutes authorizing the exclusion or deportation of contract laborers were not repealed by the act of 1903, and that immigrants coming under the prohibition of the act of 1885 could have been, and should have been, excluded at the date of the introduction of the aliens in question.

For the reasons above stated, I do not think, however, that there was any authority of law to exclude aliens not coming within the terms of the prohibition of the law of 1885, although covered by the broader terms of the prohibition contained in section 4 of the act of 1903. We are therefore referred to the original alien contract-labor law approved February 26, 1885, as the test of the propriety of the introduction of the aliens in question. The first section

of that act, which is the part material to this inquiry, is in the words following:

"That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia."

It appears from decision No. 111, above mentioned, that the aliens in question came to the United States at the suggestion and through the instrumentality of one E. J. Watson, who had been appointed an officer of the State of South Carolina under a statute which created a commissioner of a State department of agriculture, commerce, and immigration, and appropriated $2,000 to defray the expenses of the said department. Section 8 of this act is as follows (Acts of S. C., 1904, p. 451):

"That the commissioner be empowered to make such arrangements with oceanic and river steamship companies and immigration agencies in this country and abroad as may best serve the interests of successful immigration, the necessary expenditures being made within the annual appropriation for the general expenses of this department: *Provided, however*, Nothing herein shall forbid the commissioner acting without fee as the agent of such citizens of the State, who, through the South Carolina Immigration Association and the department, wish to meet excess expenses of bringing desirable immigrants to their farm or other lands. That in the discharge of these duties the commissioner, or such person as he may select, is empowered to visit such immigration centers whenever necessary to produce the best results."

Subsequently to the enactment of this law and the ap-

pointment of Mr. Watson as commissioner, certain private parties made up a fund, amounting to at least $30,000, which was placed in the hands of the commissioner. Provided with these resources he went abroad and, by advertisements and otherwise, in various European countries, collected a considerable number of laborers or artisans who were willing to migrate to South Carolina. He prepaid the passage of these immigrants under an agreement, which was afterwards canceled, that they should repay him the amount out of their wages from employments he might secure for them, and entered into an agreement with each of them, which is thus stated in decision No. 111: "Before sailing, each of the laborers signed a paper containing the scale of wages advertised as the prevailing rates paid in South Carolina, Commissioner Watson on his part agreeing to find employment for such emigrants at the rates stated. * * * The commissioner was under no obligation to supply any particular laborer, or any laborers at all, to an employer solely because he had contributed to the immigration fund; and, * * * *the immigrants themselves were free to reject any particular offer of employment that might be made.*" This is all the information laid before this Department as to the terms of these agreements, and upon such information it is impossible to say that the immigrants came within the prohibition of the act of 1885.

There are several Federal decisions to the effect that the contract under such circumstances must be one having the enforceable elements of a binding contract. The rule is probably more strongly stated in *United States* v. *Edgar* (45 Fed., 44) than in any other case. In that case it is said (p. 46):

"A contract that is not enforceable for the reason that it lacks some of the elements of a valid agreement, such as 'mutual assent' or a consideration, is not a contract. Hence the words 'contract or agreement,' as used in the statute, must be held to mean a complete contract; that is to say, an agreement entered into for a sufficient consideration to perform some kind of labor or service, to the terms of which the parties have mutually assented."

I can not see how this contract could have been enforced

legally against the immigrants. If they were at liberty to reject any particular offer of employment that might be made, their agreement to work for specified wages would seem to have been nugatory and, in fact, meaningless. As is said by Thayer, Judge, in the case lastly above cited: "If the aliens had in fact landed in the United States, and had declined to work for the defendant, the latter could not, in my judgment, have maintained an action against them as for breach of a contract to perform labor or service for him." It seems to me that this is equally true of the aliens in question. A general promise to do work at a specified rate of compensation (if, indeed, such was the purport of the contracts in question, which is not clear) amounted to nothing practical if it were coupled with an express reservation of the right to reject any particular kind of employment which might be offered to them. It amounted, in effect, to nothing more than a promise by the alien that he would work for the wages mentioned if he felt like it, when he found out what was to be required of him; and, as we are dealing with a highly penal statute, one in evident derogation of common rights, I have no hesitation in saying that these aliens do not appear to have been brought within the terms of the law of 1885.

I am equally clear that if the act of 1903 could be understood as authorizing the exclusion of those aliens whose introduction to the country was declared unlawful by section 4 of that act, these aliens would have been liable to exclusion, for it is quite clear from the statements in decision No. 111 that they did come in pursuance of an offer and solicitation on the part of Mr. Watson; but, as hereinbefore fully explained, I do not think the act of 1903 authorized the exclusion of the aliens mentioned in section 4 of that act, in so far as that section widened the scope of section 1 of the act of 1885.

It is proper for me to say that if the laborers in question had been covered by the terms of the act of 1885, the fact that Mr. Watson was a public officer of the State of South Carolina, and acted, or professed to act, in pursuance of the authority conferred upon him by the law of that State above quoted, would not have authorized the introduction

of the aliens. In the first place, under the facts stated, in paying the passage money he apparently did not act as commissioner for South Carolina, his duties as commissioner including only the dissemination of information and work of like character, but under the permission given by the South Carolina statute to act, extra-officially, as it were, as the agent of the citizens of the State who might contribute funds for the expenses of bringing over immigrants, and the passage money of the immigrants must undoubtedly have been paid, in large part, if not entirely, out of the $30,000 subscribed by the citizens of the State and not from the $2,000 expense money furnished by the State, which probably paid the commissioner's salary.

But even if he had acted entirely as commissioner for the State and paid the money out of the State treasury, the result would apparently be the same. Only one exception is made in the contract-labor acts in favor of States; that is the one contained in the act of 1891, and section 6 of the act of 1903 in reference to advertisements printed and published in foreign countries stating the inducements they offer for immigration. Under the statutes general advertisements of this character inserted by the States are specifically permitted, but in the provisions both of the original act of 1885 and under section 4 of the act of 1903, in dealing with the prepayment of passage money or other specific assistance to the migration of individual aliens, no exception is made in favor of States. All "persons" are prohibited from such prepayment of passage or other assistance, and there is no exception in favor of any person simply because he may act as agent of a State. In view of this contrast, which runs through all the labor laws, between general advertisements by States on the one hand and specific dealings with individual immigrants on the other, the specific exception made in favor of the State in the one case emphasizes the fact that no such exception is to be implied in the other case.

There can be no question, in view of the numerous decisions of the Supreme Court on this subject, as to the right of Congress to regulate the admission of aliens into

the United States, whether as immigrants or otherwise; nor yet of its right to exclude altogether any class of aliens whose entrance into the country it might deem contrary to the general welfare of the Union; and it is equally clear that no action by any State, or by any officer of a State, could operate to impair or nullify the effect of a law duly enacted on this subject. Article I, section 9 of the Constitution provides that "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808." This section of the Constitution postponed until the date named the exercise of the full power possessed by Congress over its subject-matter. As soon it had accomplished its purpose, by securing for the period mentioned the continuance of the importation of the classes of persons contemplated in it, the authority of the Federal Government over the subject-matter became complete, and from that time until the present it has been freely exercised.

To avoid misconstruction, I add a few remarks on two subjects not directly within the terms of the question submitted. The determination of the existence of the facts justifying the exclusion of the immigrants is in the first instance vested in the Secretary of Commerce and Labor. I have treated the statements as to the circumstances attending the introduction of these laborers, which are contained in the above-mentioned decision No. 111, as constituting the equivalent of a special finding of facts by that Department, and therefore as fixing the conditions of the problem submitted to this Department.

Any question as to the propriety of the introduction of aliens under the like circumstances hereafter would involve an examination of the provisions on this subject contained in the act of Congress approved February 20, 1907. Without entering into any discussion of this question, it is sufficient for me to say that under the present law such aliens, entering under the circumstances attending the introduction of those above mentioned, would be unquestionably liable to exclusion, in my opinion.

With respect to the statement contained in the letter of the chairman, "if it please you to refer this question to the Attorney-General, the committee directs me to suggest the propriety of considering Commissioner Watson's second importation as well as the first," I can only say that, as no facts in reference to this alleged "second importation" have been furnished to the Department, it is impossible for me to give an opinion regarding it.

I remain, sir,

Yours very respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

INHERITANCE LEGACY TAXES—REFUND—DALY CASE.

Claims arising under the act of June 27, 1902 (32 Stat., 406), are not barred because of the failure of claimants to present them for allowance within two years from the date of payment.

The provisions of the act of 1902 are special and apply to a particular class of obligations against the Government, and, being special, these claims are not governed by the provisions of a prior general statute, section 3228, Revised Statutes.

Suits for the recovery of money due under the act of 1902 are not actions for the recovery of taxes, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs.

The obligation is therefore one payable on demand, and the statute of limitations does not begin to run until there has been a refusal to pay or the equivalent. (*United States* v. *Wardwell*, 172 U. S., 48.)

The decision in the case of *Thacher* v. *United States* (149 Fed. Rep., 902), as to the matter of protest in the refunding of inheritance legacy taxes, is to be accepted as the rule of action in all claims arising under the various sections of the act of June 27, 1902 (32 Stat., 406).

The decision in that case, together with the views expressed in this opinion, should be regarded by the Treasury Department as the rule of administrative action in claims arising under section 3220, Revised Statutes. Opinion of May 7, 1906 (25 Op., 605), in so far as it conflicts with these views, is reversed.

There is no legal objection to the dismissal, without prejudice, of the claim of Margaret P. Daly, and other similar cases in the Court of Claims, for the purpose of settlement in accordance with this opinion; but only those portions of the claims which come

clearly within the decision of the Supreme Court in the case of *Vanderbilt* v. *Eidman* (196 U. S., 480) should be paid.

Such portions of the claims as are affected by the decision in the case of *Disston* v. *McClain* (147 Fed., 114) should be allowed to remain in *statu quo* until that case, now on appeal to the Supreme Court, has been finally decided.

DEPARTMENT OF JUSTICE,
March 11, 1907.

SIR: Answering the letter of the Commissioner of Internal Revenue of February 20, transmitted by you for an opinion with reference to the right of recovery of certain internal-revenue taxes, I have the honor to advise you as follows:

Marcus Daly, of Montana, died November 12, 1900, leaving an estate of personal property valued at about $9,825,000. In September, 1901, and February, 1902, Margaret P. Daly, as executrix, paid an inheritance tax upon various bequests to the amount of $147,384.80. Later the executrix applied to the Commissioner of Internal Revenue for a refund to her of this tax, basing her application upon section 3 of the act of June 27, 1902. This petition for a refund was denied, on the ground that the legacies upon which the tax was collected were vested interests, and therefore not refundable under the act upon which claimant relied. Suit was brought, and is now pending in the Court of Claims, asking for judgment for the entire amount of tax paid by the estate. Application has been made by the attorneys for the executrix to have so much of the tax as comes within the decision of the Supreme Court in the case of *Vanderbilt* v. *Eidman* (196 U. S., 480) refunded, leaving the balance of the tax to be disposed of in accordance with the decision of the Supreme Court in the case of *Disston* v. *McClain*, now pending in that court upon appeal from the Circuit Court of Appeals of the Third Judicial Circuit (147 Fed. Rep., 114).

Upon this statement of facts, four questions are submitted to which answers are requested:

First. Is the decision of the Circuit Court of the United States for the District of Massachusetts, rendered December 29, 1906, in the case of *Thacher et al.* v. *The United States*, as to the matter of protest, to be

accepted as the rule of action in all claims arising under the various sections of the act of June 27, 1902?

Second. Is the decision in that case as to protest to be taken as the rule of administrative action in claims arising under section 3220, Revised Statutes, notwithstanding the opinion of the Attorney-General to the contrary of date May 7, 1906?

Third. Is there any legal objection to now paying that part of the claim of Margaret P. Daly which comes under the decision of the Supreme Court in the Vanderbilt case allowing the balance to remain in the Treasury pending the decision of the court in the Disston case?

Fourth. The Circuit Court of Appeals in the Disston case held, in effect, that a life estate, or an estate for years, could not be taxed, except in so far as the income from that estate had become vested in the possession of the life tenant prior to July 1, 1902. As an effort is to be made to have this case heard in the Supreme Court, is there any objection to allowing all claims of a similar nature to remain in statu quo until that decision shall be had?

The Daly case is one of a number filed in the Court of Claims involving substantially the same questions. In some of these cases protest was made at the time of payment, and in the others there was no protest. In each of the cases recovery is sought under the provisions of section 3 of the act of Congress of June 27, 1902 (32 Stat., 406), which is as follows:

"SEC. 3. That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and

regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act, approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

It can not be held that claims arising under this act are barred, because of the failure of the claimants to present them for allowance within two years from the date of payment. The provisions of the act are special, and apply to a particular class of obligations against the Government. Being special, these claims are not governed by the provisions of the prior general statute. (R. S., sec. 3228.) Suits brought to recover money due under this act are not actions for the recovery of taxes, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs. The act, by its terms, creates and acknowledges the obligation of the Government. A method is prescribed by which each party can secure the money belonging to him whenever he wishes it. No time has been fixed by any rule of the Secretary of the Treasury, which has been called to my attention, within which a claimant must apply for it, or after which the money is forfeited to the Government. It is, therefore, an obligation payable on demand, and the statute of limitations does not begin to run until there has been a refusal to pay, or something equivalent thereto. (*United States* v. *Wardwell*, 172 U. S., 48.)

It will be observed that under the provisions of this statute Congress has granted a right of repayment, regardless of any conditions that may have heretofore operated as a bar to such repayment. The statute is an acknowledgment by Congress of a supposed moral obligation; a provision as a bounty of the Government. Whether or not the taxes were originally paid under protest is eliminated, and the question of voluntary or involuntary payment is immaterial. In the case of *Thacher et al.* v. *The United States*

(149 Fed. Rep., 902) the tax was paid voluntarily and without protest. In passing upon the effect of the statutes above quoted the court said (p. 903):

"The petitioners could not at any time have maintained suit to recover the tax as having been illegally collected. They had paid it voluntarily, not under protest. Their claim to a refund, if they had any, was moral only, and not legal. It appealed only to the Government's sense of fairness, and could be satisfied only by the bounty of the United States, given upon such terms as Congress saw fit to impose. * * * The act of 1902 fixes no time within which the claim for a refund must be filed with the collector, and no departmental regulation has been called to the attention of the court. Even if the limit fixed by Revised Statutes, section 3228, be applicable here by analogy, yet the two years therein mentioned must run, if they run at all, not from the payment of the tax, which was ineffective to create the claim here in suit, but from the passage of the act providing the bounty which the petitioners seek to obtain. That the tax paid by the petitioners in 1901 was illegally collected is irrelevant to the issues raised by this petition."

On the question of protest I must agree with the conclusions reached by the court in the above decision, and the first question is therefore answered in the affirmative.

Having concurred in the decision of the court in the case of Thacher, as to protest, that decision, together with the views expressed in this opinion, should be accepted as the rule of administrative action arising under section 3220, where the recovery is sought under the provisions of section 3 of the act of Congress of June 27, 1902. The opinion of the Attorney-General of May 7, 1906 (25 Op., 605), in so far as it is in conflict with this opinion, is reversed. The second question submitted, within the limitations of this opinion, is answered in the affirmative.

Answering the third question, there is no legal objection to the dismissal, without prejudice, of the Daly case, and other similar cases in the Court of Claims, for the purpose of settlement in accordance with this opinion. In fact, it would seem that the interests of the Government, and a

wise administration of public affairs, would demand such a course. In such settlements, only those portions of the claims which come clearly within the decision of the Supreme Court in the Vanderbilt case should be paid, allowing the balance to remain in the Treasury pending a final decision of the question in the Supreme Court.

The answer to the fourth question may be inferred from what has already been stated in this opinion. It is the duty of the administrative officers to allow such portions of the claims in question as are affected by the decision in the Disston case to remain in statu quo until that case has been decided in the Supreme Court.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

IMMIGRATION AND CONTRACT LABOR LAWS—STATE IMMIGRATION.

It is lawful for a State to advertise its inducements to immigration and to state, as part of such advertisement, the scale of wages generally prevailing within its territory. The status of immigrants induced to come to this country by reason of such advertisements would be the same as that of any other aliens lawfully admitted to the United States.

The word "person" in section 4 of the act of March 3, 1903 (32 Stat., 1214), providing that it shall be unlawful for "any person" to prepay the passage of an alien induced to migrate by any offer, solicitation, promise, or agreement to perform labor, does not include a State, but it does include an officer of a State professing to act under its authority.

The effect of the payment of the passage of an alien by another is to throw upon the alien the burden of proof that he is not liable to exclusion for the reasons mentioned in section 2 of the act of March 3, 1903 (32 Stat., 1214), or as a contract laborer under the act of February 26, 1885 (23 Stat., 332).

A State may prepay the passage of an alien immigrant out of its public funds, provided he is qualified in other respects, the advertisement being lawful, and neither the State, nor its officers, nor anyone else having otherwise solicited or encouraged the immigration. The status of such an immigrant would be the same as that of any other alien lawfully admitted to this country.

The words "promise of employment," in section 6 of the act of March 3, 1903 (32 Stat., 1215), are used in a broad sense, meaning not merely an offer of employment which, by acceptance, would create a contract enforceable against some definite person or persons, but any form of words which might be reasonably understood as holding out to a possible immigrant the prospect of assured employment.

The contribution of money by individuals to a State fund, to be used by the State in advertising its inducements to immigrants, which advertisement could not lawfully be published by private persons, and to prepay the passage of aliens attracted by such advertisement, though without promise of employment, express or implied, would amount to encouraging or assisting immigration in the form prohibited by section 6 of the act of 1903, and render the parties contributing liable to the penalties provided by section 5 of that act.

The immigrants themselves, however, could not be excluded. There is nothing in the act of 1903, or in any previous act, which would authorize their exclusion because the immigration was induced by advertisement, or even by solicitation or promise of employment, unless there was an enforceable contract existing at the time of application for admission requiring them to render service as laborers.

The act of February 20, 1907 (34 Stat., 898), provides for the exclusion, after that act takes effect, of aliens solicited or induced to migrate by reason of offers, or promises, even when there is no contract, of employment. Under existing law, although their importation is unlawful, and the parties responsible subject to punishment, the aliens themselves are allowed to enter.

Under that act, a person whose passage money is paid by another must be prepared to show, not merely that he does not come within any of the categories of immigrants to be excluded, but also that his passage was not paid, directly or indirectly, by a corporation, association, society, municipality, or foreign government.

The payment of passage money of immigrants by a State with its funds is not prohibited by the act of 1907, but its payment with funds contributed by any society or association renders the immigrant liable to exclusion, even though the payment be made through the agency of the State or its officers, and although the immigrant would otherwise be entitled to admission.

The same prohibition does not extend, however, to the payment of passage money by individuals, whether directly or through the agency of a State, provided their action is, and is shown to be, in good faith individual, and not attended by such combination or concert of action as would make it substantially the act of an association or a society.

DEPARTMENT OF JUSTICE,
March 20, 1907.

SIR: I have the honor to acknowledge your letter of the 18th instant, inclosing a letter to you of March 16 from the governor of South Carolina, and instructing me to give you my opinion as to the subject-matter of the said letter in the form of answers to the several questions therein contained. Of these questions the first is as follows:

"Is it a violation of the immigration law in force up to the time of the taking effect of the act approved February 20, 1907, for a State, acting through its officers, to advertise its inducements and publish abroad the scale of wages prevailing within its borders, provided no contract or agreement, express or implied, is entered into between such immigrants and the officers of the State or with any other person? What would be the status of an alien applying for admission under such conditions?"

The act approved March 3, 1903, entitled "An act to regulate the immigration of aliens into the United States" (32 Stat., 1213), contains the following provisions:

"SEC. 4. That it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any alien into the United States, in pursuance of any offer, solicitation, promise, or agreement, parole or special, express or implied, made previous to the importation of such alien to perform labor or service of any kind, skilled or unskilled, in the United States.

"SEC. 5. That for every violation of any of the provisions of section four of this Act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any alien to the United States to perform labor or service of any kind by reason of any offer, solicitation, promise, or agreement, express or implied, parole or special, to or with such alien shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his

own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

"SEC. 6. That it shall be unlawful and be deemed a violation of section four of this Act to assist or encourage the importation or migration of any alien by a promise of employment through advertisements printed and published in any foreign country; and any alien coming to this country in consequence of such an advertisement shall be treated as coming under a promise or agreement as contemplated in section two of this Act, and the penalties imposed by section five of this Act shall be applicable to such a case: *Provided*, That this section shall not apply to States or Territories, the District of Columbia, or places subject to the jurisduction of the United States advertising the inducements they offer for immigration thereto, respectively."

These provisions contain substantially all the law in force at the present time and until the act approved February 20, 1907, shall become effective in accordance with its terms, that can be material to determine the answer to the foregoing first question, and I, therefore, reply that it is lawful for a State to advertise its inducements to immigration and to state, as part of such advertisement, the scale of wages generally prevailing within its territory, it being my understanding of the question that such advertisements be limited to setting forth the inducements offered by conditions prevailing within the State to immigrants, leaving the said immigrants to draw their own conclusions from such advertisements as to the advisability of coming to the said State. Supposing immigrants to have been induced to come to the said State through advertisements of the character above described as lawful, the status of the said immigrants would be the same as the status of any other aliens lawfully admitted to the United States.

The second question propounded in the letter of the governor is as follows:

"May a State, acting as such, and having advertised its inducements and scale of wages, prepay with funds duly appropriated to its immigration department the passage of the alien attracted by the inducements advertised, provided no contract or agreement, express or implied, is entered into between the alien and the officers of the State, or with any other person, and such alien upon arrival is left free to choose employment in all respects as if he had paid his passage with his own funds and had come entirely independent of the representatives of the State? What would be the status of an alien applying for admission under these conditions?"

Under the provisions of section 4 of the act approved March 3, 1903, above set forth, it is made unlawful for "any person" to prepay the passage of an alien induced to migrate by any "offer, solicitation, promise, or agreement" made previous to his importation "to perform labor or service of any kind" in this country. The word "person," as here used, does not, in my opinion, include a State; but it does include an officer of a State professing to act under its authority. The prepayment, however, is made unlawful only when there is also "an offer, solicitation, promise, or agreement;" and, by section 6 of the same act, an advertisement on the part of a State of the character described in the first question and also in this question would not have the effect of an offer, solicitation, or promise, although it might have such effect if published without State authority. Sections 4, 5, and 6 of the said act do not therefore prohibit the importation of aliens under circumstances supposed.

Section 2 of the same act provides that the following classes of aliens shall be excluded from the United States: "All idiots, insane persons, epileptics," and a large number of categories of undesirable immigrants. It then proceeds: "And also any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing ex-

cluded classes." Among the classes mentioned, persons coming within the prohibition of section 4 of the same act above quoted are not included, nor are "contract laborers," as defined by the previous acts relating to the same subject. But, by the act approved March 3, 1891 (26 Stat., 1084), it was provided in the same language that a person whose passage or ticket was paid for by another should be excluded unless he could affirmatively and satisfactorily show that he did not belong to the class of contract laborers excluded by the act of 1885. The effect, therefore, of the payment of the passage of an alien by another is to throw upon the said alien the burden of proof that he is not liable to exclusion either for the reasons mentioned in section 2 of the act of 1903, or as a contract laborer under the original act approved February 26, 1885 (23 Stat., 332). Supposing the immigrants qualified in other respects, the advertisement to be lawful, in accordance with the answers to the first question, and that neither the State nor its officers, nor anyone else, had otherwise solicited or encouraged the immigration except by payment of the immigrants' passage out of the public funds of the State, this burden of proof could evidently be sustained, the introduction of the immigrants would be lawful and their status would be the same as that of any other aliens lawfully admitted to this country.

The third question is as follows:

"May a State, acting as such, through its officers accept contributions to the fund appropriated for the support of its immigration department, provided such funds are contributed free from any contract or reciprocal agreement, and with such funds advertise its inducements and scale of wages and prepay out of said funds the passage of aliens attracted by such advertisement, provided such alien comes free from any contract or agreement, express or implied, with the State officers or with any other person, and enters as free in all respects to choose employment and remain in or depart from the State as if he had paid his own passage? What would be the status of an alien applying for admission under these conditions?"

The answer to this question is not free from difficulty. It will be seen upon examination of section 6 of the act of 1903, hereinbefore given, that it is unlawful for anyone to "assist or encourage the importation or migration of any alien by a promise of employment through advertisements printed and published in any foreign country." The words "promise of employment" are evidently here used in a broad and somewhat loose sense, meaning, not merely an offer of employment which, by acceptance on the part of any alien coming within its terms, would create a contract enforceable against some definite person or persons, but any form of words which might be reasonably understood as holding out to a possible immigrant the prospect of assured employment, although they might not import any legal responsibility on the part of anyone. This construction seems to me necessary, because if the words are to be construed strictly, in the first place, the exception in favor of States which shall advertise their "inducements for immigration" would be unnecessary; and, secondly, the section itself would be superfluous, its purport being fully covered by the terms of section 4. An advertisement, therefore, which would be lawful on the part of a State under section 6 might be unlawful on the part of individuals; and the hypothesis of the question is not sufficiently definite in this respect to enable me to say whether it does or does not refer to an advertisement of this character.

Supposing that the advertisement would be illegal if inserted by the individual contributors without the State's intervention, then, inasmuch as the illegality consists in causing its publication—as an advertisement—and paying for such publication would help to cause it, the contribution of money to be used for such advertisements, with knowledge on the part of the contributor that the money was to be put to this use, would amount, in my opinion, to encouraging or assisting immigration in the form prohibited by section 6. That the advertisement was actually inserted by a public officer under the authority of a State statute would not, in my opinion, relieve the person who furnished the means to pay for the advertisement from the consequences

of his act; so far as he was concerned, the public official inserting the advertisement must be deemed his agent for the purpose above described. If, therefore, as I understand to be the hypothesis of this question, the money contributed by private persons were given with the knowledge that it would and the intention that it should be used to pay for the advertisement, and if the advertisement were one which could not be lawfully published by such private persons, this contribution would bring the advertisement within the prohibition of section 6 and render the parties contributing liable to the penalties provided by section 5; whether the advertisement did or did not come within this description it would be very difficult to determine without seeing its precise language.

With respect to the immigrants, however, the case would be different. There is nothing in the act of 1903, or in any previous act, which would authorize their exclusion from the country because their immigration was induced by advertisements, or, indeed, by the solicitation or promise of employment in any form, unless there was an enforceable contract existing at the time of their application for admission requiring them to render service as laborers. While, therefore, the parties providing the money for the publication of the advertisements might be, in my opinion, liable to the penalties imposed by section 5, the immigrants themselves, upon the hypothesis of the third question, could not be excluded from the United States, and their admission would be lawful.

In the foregoing answers no reference has been made to a provision in the act of 1903 to the effect that skilled labor may be imported if labor of the like kind unemployed can not be found in this country. I assume that the inquiries of the governor relate wholly to the importation either of unskilled labor or of skilled labor when labor of like kind can be found unemployed in this country.

The fourth question is:

"Will the answers to the foregoing questions be materially different after the taking effect of the act approved the 20th of February, 1907; and if different, in what respect?"

This question must be answered in the affirmative. Section 2 of the act approved February 20, 1907 (34 Stat., 898), provides that the following classes of aliens shall be excluded from admission into the United States: "All idiots, imbeciles, feeble-minded persons, epileptics, insane persons," and a large number of other categories of undesirable immigrants; and includes among the classes of aliens to be excluded the following:

"Persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written, or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled;" and also

"Any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes, and that said ticket or passage was not paid for by any corporation, association, society, municipality, or foreign government, either directly or indirectly."

These provisions change the law in two particulars: In the first place, aliens solicited or induced to migrate by reasons of offers, or promises, even when there is no contract of employment will be excluded after this act takes effect. At present, although their importation is unlawful and subjects the parties responsible for it to punishment, the aliens themselves are allowed to enter. Secondly, the person whose passage money is paid by another must be prepared to show, not merely that he does not come within any of the categories of immigrants to be excluded, but also that his passage was not paid by a corporation, an association, a society, a municipality, or a foreign government; and this provision against such payment by any of the agencies mentioned is effective whether the payment be made directly or indirectly.

While, therefore, the payment of the passage money of such immigrants by a State with its public funds is not prohibited, its payment with funds contributed by any society or association renders the immigrant liable to ex-

clusion, although the payment may be made through the agency of the State or its officers, and although the immigrant would be otherwise entitled to admission. The same prohibition, however, does not extend to the payment of the passage money by individuals, whether directly or through the agency of a State; provided that their action is, and is satisfactorily shown to be, in good faith individual and is not attended by such combination or concert of action as would make it substantially the act of an association or society.

For the sake of clearness only, I may here note that section 4 of the same act is as follows:

"That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act."

The last provisos mentioned in section 2 are those relating to the importation of skilled labor when the like can not be found unemployed, and to certain classes of aliens who are not included among those whose importation is forbidden. These provisos are in the same language precisely as is used in the law of 1903. In the act of 1903 the conduct described in section 4 is only characterized as "unlawful," while in the act of 1907 it is made "a misdemeanor;" this seems a matter of minor consequence, and since, as above noted, the definition of "contract laborers," given in section 2 of the present law, is broad enough to include the persons whose importation is forbidden by section 4 of the law of 1903, it follows that the same section of the act approved February 20, 1907, although different in language from section 4 in the act of 1903, is substantially the same in meaning.

I remain, sir,

Yours very respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

EXECUTIVE DEPARTMENTS—TRANSFER OF CLERKS AND EMPLOYEES.

The terms "Departments," or "Executive Departments," as used in acts of Congress and in the Revised Statutes, invariably apply to one or more of the several Executive Departments mentioned in section 158 Revised Statutes, or included within the terms of that section by subsequent enactments, unless a different meaning is clearly indicated by the context.

The term "Department," as used in laws relating to the civil service, is distinguished from "Office," "bureau," and "branch;" and subordinates of the several Executive Departments are distinguished from employees of the last-mentioned governmental agencies.

It is lawful for the Civil Service Commission to consent to the transfer of a classified employee from an independent office of the Government to a Department or another independent office or bureau, although such employee may not have served three years in the office or bureau from which he seeks transfer, as is required by section 5 of the act of June 22, 1906 (34 Stat., 389, 449), of clerks and employees of the Executive Departments.

The "field force" of an Executive Department—that is, its classified employees under its immediate control, as inspectors, examiners, and agents, though employed usually or invariably away from the seat of Government—are governed by the above-mentioned statutory provision with regard to transfers.

The Government Printing Office, the Interstate Commerce Commission, and the Smithsonian Institution are independent of any of the Executive Departments mentioned in section 158 Revised Statutes.

The Bureau of Insular Affairs is an integral part of the War Department.

The provisions of the act of June 22, 1906 (34 Stat., 449), with regard to transfer of clerks and employees, are not applicable to the Philippine Commission or to the Isthmian Canal Commission.

DEPARTMENT OF JUSTICE,
March 29, 1907.

SIR: I have the honor to acknowledge your letter transmitting a communication under date of February 28, 1907, from the Civil Service Commission to you, and instructing me to give my opinion as to the several questions asked by the Commission in the said communication. These questions all depend upon the following provision contained in

the legislative, executive, and judicial appropriation bill approved June 22, 1906 (34 Stat., 389, 449):

"It shall not be lawful hereafter for any clerk or other employee in the classified service in any of the Executive Departments to be transferred from one Department to another Department until such clerk or other employee shall have served for a term of three years in the Department from which he desires to be transferred."

The first query of the Commission is thus stated:

"The Commission desires to be advised whether under this section it is lawful to transfer, or to consent to the transfer, of a classified employee from an independent office—such as the Civil Service Commission, the Isthmian Canal Commission, or any other of the independent bureaus or offices—to a Department, or to another independent office or bureau."

Title 4 of the Revised Statutes of the United States is headed:

"Provisions applicable to all the Executive Departments."

Section 158, being the first section under the title aforesaid, is as follows:

"*Application of provisions of this title.*—The provisions of this title shall apply to the following Executive Departments:

"First. The Department of State.

"Second. The Department of War.

"Third. The Department of the Treasury.

"Fourth. The Department of Justice.

"Fifth. The Post-Office Department.

"Sixth. The Department of the Navy.

"Seventh. The Department of the Interior."

By subsequent enactments the provisions of this section are extended to the Department of Agriculture and the Department of Commerce and Labor. Section 159 is in the words following:

"*Word 'Department.'*—The word 'Department' when used alone in this title, and titles five, six, seven, eight, nine, ten, and eleven, means one of the Executive Departments enumerated in the preceding section."

The several titles mentioned in the foregoing section

relate respectively in succession to each one of the several Departments therein mentioned. In a very large number of provisions of law, some of them included in the Revised Statutes, and some of them in acts of Congress subsequently approved, the terms "Department" or "Executive Department" are used, and, so far as I can ascertain, these terms invariably apply to one or more of the several Executive Departments mentioned in section 158, or included within the terms of that section by subsequent enactments, unless a different meaning is clearly and unmistakably indicated by the context. The proviso in the act of 1906 evidently was not intended to apply to the entire classified civil service, for, if it were, the words "in any of the Executive Departments" would be altogether superfluous. It is evident, therefore, that some portion of the classified civil service was to be excluded from its operation, and, in view of the circumstances hereinbefore enumerated, there would seem to be little, if any, room for doubt that only the subordinates of the several agencies of the Government enumerated in section 158 as Executive Departments were to be included.

If, however, there were any room for doubt on this subject, I think it would be removed by the language of the Civil-Service law (22 Stat., 403) itself. Section 2 of the said act provides as follows:

"That is shall be the duty of said commissioners:

"First. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the Departments *and offices* to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modification thereof, into effect."

The third clause of section 6 of the same act is as follows:

"Third. That from time to time said Secretary, the Postmaster-General, and each of the heads of Departments mentioned in the one hundred and fifty-eighth section of the Revised Statutes, *and each head of an office*, shall, on the direction of the President, and for facilitating the execution of this act, respectively, revise any then existing clas-

sification or arrangement of those in their respective departments *and offices*, and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective Departments not before classified for examination."

Finally, section 11 is in the words following:

"That no Senator, or Representative, or Territorial Delegate of the Congress, or Senator, Representative, or Delegate-elect, or any officer or employee of either of said houses, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, *branch, or bureau* of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any Department, *branch, or bureau* thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States."

These provisions make it quite clear that the term "Department" as used in laws relating to the civil service, is distinguished from "office," "bureau," and "branch," and that subordinates of the several Executive Departments are distinguished from employees of the last-mentioned several governmental agencies, and it is to be supposed that Congress in using the same words in a provision relating to the same subject-matter used them in the same well established sense. I reply, therefore, to the first inquiry, that it is lawful for the Commission to consent to the transfer of a classified employee from an independent office to a Department or another independent office or bureau, although such employee may not have served for a term of three years in the independent office or bureau from which he has sought to be transferred.

The second query of the Commission is as follows:

"The Commission desires to be advised whether under

existing statutes what is known as the 'field force' of an Executive Department—that is to say, the classified employees of an Executive Department not on duty with the Department proper at Washington—may be transferred to another Department until after such employees shall have served for a term of three years in the Department from which they desire to be transferred. Or, in other words, are the classified employees of any of the Executive Departments outside of Washington governed by the statutes aforementioned?"

There is nothing in the language of the proviso itself which limits its application to subordinates of the Executive Departments at Washington. The act itself makes provision for the compensation of officers and employees in all parts of the country; and if it had been the intention of Congress to restrict the effect of the proviso to those employees whose duties were performed at the seat of Government, it may be reasonably presumed that it would have used appropriate language to give effect to this intention. To restrict the operation of this proviso to this particular class of employees, would require an arbitrary addition to its language, for which no necessity is perceived, and which would materially change the sense of what the legislative branch of the Government, in fact, has said. It is true that in an opinion by Attorney-General Devens, rendered May 16, 1877 (15 Op., 262), it is held that certain provisions of law permitting the use of official envelopes to "each of the Executive Departments of the United States" and their respective "subordinate offices" were limited to "subordinate offices" of the said several Departments *at the seat of Government.* This opinion, however, does not affect the present question, if I rightly understand to what class of subordinates the Civil Service Commission refers as "the 'field force' of an Executive Department." Attorney-General Devens says of the "subordinate offices" he excluded from the operation of the statutes he had under consideration:

"The Department, with its bureaus or offices, is in contemplation of the law an establishment distinct from the branches of the public service and the offices thereof which

are under its supervision. Thus the office of postmaster, or of collector of internal revenue, or of pension agent, or of consul, is not properly a *departmental* office—not an office *in the* Department having supervision over the branch of the public service to which it belongs. True, an official relation exists here between the office and the Department, one, moreover, of subordination of the former to the latter, but this does not make the office a part of the Department."

I do not, however, understand the Commission's inquiry to refer to subordinates in any such offices as are mentioned in the opinion, but to such as are under the immediate control of the several Departments, like inspectors, examiners, and agents, although employed usually or invariably away from the seat of Government. Thus understanding the question, I reply, that the classified employees of the several Executive Departments outside of Washington are governed by the above-mentioned statute.

The third query of the Commission is to the following effect:

"What is the status, under this act, of the Philippine Commission, the Isthmian Canal Commission, the Bureau of Insular Affairs, the Government Printing Office, the Interstate Commerce Commission, and the Smithsonian Institution? Is each of the above an independent bureau or is it a part of one of the Executive Departments mentioned in the act of June 22, 1906?"

Of the various establishments mentioned, there can be no doubt that the Government Printing Office, the Interstate Commerce Commission, and the Smithsonian Institution are independent of any of the Executive Departments mentioned in section 158 of the Revised Statutes. Neither can there be any doubt of the fact that the Bureau of Insular Affairs is an integral part of the War Department. The only two agencies as to which there can be, in my opinion, any question, are the Philippine Commission and the Isthmian Canal Commission, and, as to the first, the question would appear to be determined by opinion of the Comptroller of the Treasury (11 Comp. Dec., 702), of which the head note says: "An employee of the Philippine government is not an employee of the United States within

the meaning of the prohibition in section 1765, Revised Statutes, against the payment of additional or extra compensation." This decision is based upon the opinion of the Supreme Court in *Dorr* v. *United States* (195 U. S., 138) and, although the last-mentioned case related to a totally different question, it sustains, in my opinion, the position that a statute of the character of this proviso will not be held applicable to the Philippine civil service without words making it expressly and specifically apply to it. There does not seem to be any authority on the status of officers or employees of the Isthmian Canal Commission, but I think, by a fair analogy, they must be distinguished from officers or employees of the War Department. In an opinion of Solicitor-General Richards, approved by Attorney-General Knox (24 Op., 541), it is said to be "a reasonable inference that, until otherwise provided, Congress intended that the government for the Philippine Islands, authorized and approved by the act of July 1, 1902, should be regarded as a branch of the War Department." Notwithstanding this fact it was held in the same opinion (p. 538), as well as by the Comptroller, in the opinion above cited, that the government for the Philippine Islands was "distinct from our own and not governed by the same laws," and this determination is sustained by the decision of the Supreme Court in Dorr's case, above cited. Therefore, although the Isthmian Canal Commission has been placed by the President under the supervision of the Secretary of War, I think it clear that its service is to be regarded as altogether distinct from that of the War Department, and that this proviso does not affect employees of the Isthmian Canal Commission, or in anywise apply to them.

I remain, sir,

Yours very respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

PURE-FOOD LAW—LABELING OR BRANDING WHISKY.

The words "Compound" or "Blend" are substantially synonymous, in ordinary speech, when applied to mixtures or liquids; but the pure-food law establishes a distinction of its own between them, based upon the character of the ingredients entering into the mixture.

In what may be termed a "Blend" of, or "Blended," wines or whiskies, the two articles mixed must be capable of accurate and sufficient description by a single generic term; they must be substances known by the same name and sufficiently distinctive to afford reasonable warning to purchasers.

The intent of the pure-food act of 1906 (34 Stat., 768) is that the term "Blended Sherry," for instance, or "Blend of Sherries," shall designate a mixture of two or more kinds of sherry; while the titles "Compound of port and sherry," or "Compounded port and sherry," would appropriately designate a mixture of two substances, *unlike* in the view of the law, namely, two distinct and different kinds of wine—"unlike" in the sense that diamonds and coal are unlike.

Whisky is a natural spirit having certain "congeneric substances" which give character to the distillate.

A mixture of two or more different whiskies, as thus defined, whether their differences arise from the character of the substances from which they are distilled or from the method of distillation used, or even from their several ages and the environment in which they are kept subsequently to distillation, would be appropriately termed a "Blend of whisky," or "Blended whisky," or "Blended whiskies," any one of which would be correct, provided each article entering into the combination, standing alone, could be properly designated as "Whisky."

A mixture of a spirit properly designated "Whisky" with another spirit which, standing alone, could not be properly designated as "Whisky," such as ethyl alcohol, must be labeled or branded as a "Compound" or as "Compounded."

For the purposes of the pure-food law, neutral spirit, or ethyl alcohol, if absolutely pure, would be not only *like*, but *identical*, whether it were derived from fruit, from cereals, from sugar cane, or from any other of the many substances which can furnish alcohol.

A neutral spirit is not a like substance to whisky.

A mixture of whisky with neutral spirit must be deemed a "Compound" and not a "Blend," although the spirit may be a distillate from the same substance used to furnish the whisky.

If ethyl alcohol, either pure or mixed with distilled water, were given, by the addition of harmless coloring and flavoring sub-

stances, the appearance and flavor of whisky, no other name could be found for the product, in conformity with the pure-food law, than "Imitation whisky;" but it is questionable whether such mixture ought to be labeled "Whisky" at all.

When the words "Compound" or "Compounded" are used in the act, it is ordinarily necessary that two substances at least should be mentioned as entering into the combination described, as, for instance, "Sherry compounded with port" or "Port compounded with sherry" or "Compounded port and sherry."

It is not, however, universally true that *two* substantives *must* follow "Compound" or "Compounded," although it is true that only one substantive can appropriately follow "Blend" or "Blended."

A combination of whisky with ethyl alcohol, supposing, of course, that there is enough whisky in it to make it a real compound and not a mere semblance of one, may be fairly called "Whisky," provided the name is accompanied by the word "Compound" or "Compounded," and a statement of the presence of another spirit is included in substance in the title; it can not, however, properly be styled "Blended whisky."

DEPARTMENT OF JUSTICE,
April 10, 1907.

SIR: In accordance with your instructions, I have examined the papers referred to me by you, at the suggestion of the Secretary of Agriculture, and herewith submit you my opinion on certain questions which appear from the said papers to have arisen in connection with the labeling or branding of different kinds of spirit claimed by their manufacturers or proprietors to be entitled to the name of "Whisky," with or without qualifying words. In addition to the papers referred to me by you, I have received and considered a number of other papers submitted to me by various individuals, including Messrs. Hemphill and Worthington and Mr. W. M. Hough, as counsel for certain distillers and rectifiers interested in the questions under consideration, and I have personally gathered some further information which seemed to me material in view of the character of the questions involved.

These questions have arisen in the construction of section 8 of the act approved June 30, 1906 (34 Stat., 768), entitled:

"An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or

deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes,"
and generally known as "The pure-food law." The portion of that law bearing upon the points in dispute is section 8, which, so far as is material, is as follows:

"SEC. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular. * * * That for the purposes of this act an article shall also be deemed to be misbranded: * * * In the case of food: First. If it be an imitation of or offered for sale under the distinctive name of another article. * * * Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

"Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this act shall be construed as requiring or compelling pro-

prietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding."

Before stating or discussing the particular questions as to which you desire my opinion, I think it will conduce to clearness to call attention to the general purpose of this act and to some considerations founded thereon.

The primary purpose of the pure-food law is to protect against fraud consumers of food or drugs; as an incidental or secondary purpose, it seeks to prevent, or, at least, discourage, the use of deleterious substances for either purpose; but its first aim is to insure, so far as possible, that the purchaser of an article of food or of a drug shall obtain nothing different from what he wishes and intends to buy. According to the recognized canons of statutory construction, the language of its provisions must be interpreted with reference to and in harmony with this primary general purpose; so that, in determining the proper nomenclature for articles of food as defined in the act, the intention of the law will be best observed by giving to such articles names readily understood and conveying definite and familiar ideas to the general public, although such names may be inaccurate in the view of a chemist or physicist or an expert in some particular industrial art, as in the distillation and refining of spirits. Moreover, the same name may be given by dealers or by the general public to two or more substances varying very materially in their scientific characteristics, and this fact must be given due weight in passing upon questions of branding or labeling under the law.

Human experience has associated certain impressions on the senses of taste and smell with the consumption of certain articles of food, and the so-called "flavor" which expresses the resultant of these impressions constitutes a factor of decisive weight in determining the similarity or identity of substances of this character to the mind of the ordinary member of the community, quite irrespective of the relative importance of those chemical or physical properties in the substances which impart this flavor as com-

pared to their other chemical or physical properties. This fact is aptly illustrated by a question considered at much length in the papers referred and also submitted to me as above, namely: "What is whisky?" A chemist or a distiller might answer this question altogether differently from the ordinary purchaser of whisky for his own consumption; but the purchaser's view of the matter is material to attain the primary purpose of the pure-food law; and I think it may be safely said that what he means by "whisky" when buying it is a distilled spirit, fit for use as a beverage and having the particular flavor which human experience has classified as that of "Whisky." Undoubtedly the flavors of different kinds of spirits, all known as "Whisky," differ considerably, and it may be that the general impression of their similarity is due, in some measure, to imagination or imperfect memory; nevertheless, a distinct and definite idea is suggested to the mind by the words "whisky flavor;" this idea is an essential factor in ascertaining the identity of a spirit claimed to be whisky, and, in my opinion, it is the decisive factor in determining the relative weight of the claims of two or more kinds of spirit to the name.

With this preliminary explanation, I proceed to state what I understand to be the questions as to which my opinion is desired. In substance, these are:

First. Under what circumstances should a distilled spirit be labeled or branded "Whisky" without any qualifying words?

Second. Under what circumstances should a liquid be marked a "Blend of whiskies," or "Blended whisky," or "Blended whiskies?"

Third. Under what circumstances should a liquid be marked as a "Compound of whisky," or "Compounded whisky," and what word or words, if any, must be added to such title to make the same appropriate under the law?

Fourth. Under what circumstances, if at all, could a distilled spirit, with additions of coloring and flavoring substances, be termed "Imitation whisky?"

Before dealing directly with these questions, I think it may be well to indicate the application of this law to a

class of liquids affording a field for its interpretation with less opportunity for dispute—I refer to wines. It will not be questioned that to be branded or labeled "Sherry," "Port," or "Madeira," a wine must have inherently, and not because any other substance is added to it, the flavor known as that of sherry, port, or madeira, as the case may be. There are different kinds of each of these wines; experts can recognize different brands or vintages by their respective flavors, and these flavors vary considerably; nevertheless, there can be no doubt that the sherry, the port, and the madeira flavors are distinct from each other, and that each of them has some quality of its own shared by all varieties of the same species of wine.

There is, however, an evident distinction to be drawn between a wine such as sherry, port, or madeira, and a wine such as champagne. In the view of a chemist or physicist, champagne would be doubtless described as "a compound," for it consists essentially of a wine, of sugar, and of an aerating gas, three substances obviously "unlike." The law, however, in my opinion, does not contemplate that an article should be marked as a "blend," "compound," or "imitation" unless its designation would be otherwise "false or misleading" to the consumer; and the name "Champagne" would indicate to any would-be purchaser, who was ordinarily intelligent and well-informed, a wine artificially sweetened and aerated, or, in other words, a composite substance.

To determine the proper use of the term "Blend" we must first note that the definition of the word in the law is novel and arbitrary. It it thus defined by Webster:

"Blend, n. A thorough mixture of one thing with another, as colors, liquors, etc.; a shading or merging of one color, tint, etc., into another, so that it can not be known where one ends or the other begins."

There is nothing in this definition about "likeness" in the substances mingled; this feature is introduced for some special purpose in the law, and the latter must be interpreted so as to give effect to this purpose. To show this more clearly we may also note the same dictionary's definition of "Compound." This is:

sification or arrangement of those in their respective departments *and offices*, and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective Departments not before classified for examination."

Finally, section 11 is in the words following:

"That no Senator, or Representative, or Territorial Delegate of the Congress, or Senator, Representative, or Delegate-elect, or any officer or employee of either of said houses, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, *branch, or bureau* of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any Department, *branch, or bureau* thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States."

These provisions make it quite clear that the term "Department" as used in laws relating to the civil service, is distinguished from "office," "bureau," and "branch," and that subordinates of the several Executive Departments are distinguished from employees of the last-mentioned several governmental agencies, and it is to be supposed that Congress in using the same words in a provision relating to the same subject-matter used them in the same well established sense. I reply, therefore, to the first inquiry, that it is lawful for the Commission to consent to the transfer of a classified employee from an independent office to a Department or another independent office or bureau, although such employee may not have served for a term of three years in the independent office or bureau from which he has sought to be transferred.

The second query of the Commission is as follows:

"The Commission desires to be advised whether under

existing statutes what is known as the 'field force' of an Executive Department—that is to say, the classified employees of an Executive Department not on duty with the Department proper at Washington—may be transferred to another Department until after such employees shall have served for a term of three years in the Department from which they desire to be transferred. Or, in other words, are the classified employees of any of the Executive Departments outside of Washington governed by the statutes aforementioned?"

There is nothing in the language of the proviso itself which limits its application to subordinates of the Executive Departments at Washington. The act itself makes provision for the compensation of officers and employees in all parts of the country; and if it had been the intention of Congress to restrict the effect of the proviso to those employees whose duties were performed at the seat of Government, it may be reasonably presumed that it would have used appropriate language to give effect to this intention. To restrict the operation of this proviso to this particular class of employees, would require an arbitrary addition to its language, for which no necessity is perceived, and which would materially change the sense of what the legislative branch of the Government, in fact, has said. It is true that in an opinion by Attorney-General Devens, rendered May 16, 1877 (15 Op., 262), it is held that certain provisions of law permitting the use of official envelopes to "each of the Executive Departments of the United States" and their respective "subordinate offices" were limited to "subordinate offices" of the said several Departments *at the seat of Government.* This opinion, however, does not affect the present question, if I rightly understand to what class of subordinates the Civil Service Commission refers as "the 'field force' of an Executive Department." Attorney-General Devens says of the "subordinate offices" he excluded from the operation of the statutes he had under consideration:

"The Department, with its bureaus or offices, is in contemplation of the law an establishment distinct from the branches of the public service and the offices thereof which

"Blend;" it could only be accurately labeled, under the law, as a "Compound of genuine and imitation sherries," a designation which would not probably promote its sale.

Applying the same principles to the choice of brands or labels for distilled spirits, and especially for whiskies, we are at once confronted by the question whether whisky corresponds to a wine like sherry or to a wine like champagne; that is to say, whether it is a natural or artificial spirit; meaning by the first term, of course, not that it exists anywhere as a product of nature, but that it is the resultant of the process of distillation alone, without needing any further addition to furnish its characteristic qualities. In the first case, it would be assimilated to brandy or rum; in the second contingency, to gin, since gin is essentially a distilled spirit, frequently as nearly neutral as may readily be, flavored by an infusion of juniper berries. I learn from the papers referred to me that the Department of Agriculture has reached the conclusion that whisky, like brandy and rum and unlike gin, is a natural spirit, its peculiar taste and aroma being imparted to it in the course of distillation and arising primarily from essential oils existing in the substances from which it may be distilled; that is to say, it corresponds to a wine like sherry and not to a wine like champagne. This conclusion seems to be fully warranted by information contained in the papers before me and by such other information as I have been able to obtain; nevertheless, as hereinafter set forth, the statement may, perhaps, need some qualification, or, rather, some explanation. It is doubtful, however, whether the definition of "Whisky" contained in the papers aforesaid, and which I understand to have received the approval of the Department of Agriculture, is quite broad enough to meet the general intent of the law of 1906. This definition I understand to be as follows:

"Whisky is a distillate, at the required alcoholic strength, from the fermented mash of malted cereals, or from malt with unmalted cereals, and contains the congeneric substances formed with ethyl alcohol which are volatile at the ordinary temperatures of distillation, and which give the character to the distillate."

In Webster's Dictionary "Whisky" is defined as:

"An intoxicating liquor distilled from grain, *potatoes, etc.*, especially in Scotland, Ireland, and the United States. In the United States whisky is generally distilled from maize, rye, or wheat, but in Scotland and Ireland is often made from malted barley."

In Worcester's Dictionary it is defined as:

"A kind of spirit distilled from barley, wheat, rye, maize, *potatoes, etc.*"

In Chambers's Encyclopedia of 1875 it is defined as follows:

"A spirit made by distillation from grain of any sort and from other materials, as buckwheat, *potatoes, and even turnips.*"

A large number of similar definitions from standard popular works of reference might be given, and I think there can be no doubt that a spirit generally known and described as "Whisky" is often distilled from potatoes and occasionally from some other substances which could scarcely be correctly classed as cereals. I note this fact because it appears to me contrary to the spirit and subversive of the purpose of the pure-food law to adopt a definition which would exclude from the name any substance generally understood by the public to be entitled to it; that is to say, the nomenclature adopted to give effect to the act ought to be, in my opinion, popular and not scientific. This matter, however, is of only subordinate importance in connection with the questions immediately under discussion.

It being admitted that whisky is a natural spirit having certain "congeneric substances," which, in the language of the above definition, "give the character to the distillate," it seems obvious that a mixture of two or more different whiskies as thus defined, whether their differences arise from the character of the substances from which they were distilled or from the method of distillation used in each case respectively, or even from their several ages and the environment in which they were kept subsequently to distillation, would be appropriately termed a "Blend of

whiskies," or "Blended whisky," or "Blended whiskies;" any one of these three terms would be appropriate, provided that each article entering into the combination, standing alone, would be appropriately designated as "Whisky."

The mixture of a spirit properly designated as "Whisky" with another spirit which, standing alone, could not be properly designated as "Whisky," such as ethyl alcohol, must, in my opinion, be labeled or branded as a "Compound," or as "Compounded." This question has given rise to a very animated dispute, and it is understood that great importance is attached by dealers to its determination, which is thought to involve serious pecuniary loss or gain to some or others among them; I have, therefore, considered it very carefully. In Chambers's Encyclopedia, above quoted, Volume III, article "Distillation," occurs the following passage:

"If only alcohol and water passed over in distillation, *all spirits, from whatever extracted, would be the same;* but this is not the case. Brandy, which is distilled from wine, has a peculiar essential oil derived from the grape and also some acid; rum is impregnated with an essential oil from the sugar cane, and with other impurities; malt liquor has the essential oil of barley, etc. It is these essential oils that give to the various spirits their distinguishing flavors. Some of the oils and other impurities are disagreeable and positively noxious, and it is one of the objects of *rectifying* to remove these. The mellowing effects of age upon spirits is owing to the evaporation or spontaneous decomposition of the essential oils. Newly distilled spirits are, in general, fiery and specially unwholesome."

This statement from a popular work seems to be fully sustained by works of greater scientific authority and shows, in my opinion, that, for the purposes of the pure-food law, neutral spirit or ethyl alcohol, if absolutely pure, would be not only *like*, but actually *identical*, whether it were derived from fruit, from cereals, from sugar cane, or from any other of the many substances which can furnish alcohol. Inasmuch as a state of *absolute* purity can not be

attained by any treatment appropriate for commercial purposes, it may be, perhaps, more nearly accurate to say that each of these different kinds of neutral spirit is a *like* substance to one of any other kind; but, if we concede that ethyl alcohol is a "like substance" to whisky, then we must also concede that brandy and rum are "like substances" to whisky also, because each of them, on precisely the same grounds, can be likened to neutral spirit. It is undoubtedly true that only a very small proportion (less than the half of 1 *per centum*) of the ingredients entering into whisky are different from those entering into neutral spirit; but this is equally true of brandy and rum, and it is precisely those substances which "give the character to the distillate" in each of these cases.

In the nature of things there can have been, as yet, no judicial decisions as to the meaning of the terms used in the pure-food law, but section 3287 of the United States Revised Statutes, as amended in 1879, 1880, and 1899, has been cited to me to show the "likeness" of whisky and neutral spirit as matter of law; I find, however, nothing in that section at all relevant to the present discussion. It requires the cask to indicate "the particular name of such distilled spirits as known to the trade—that is to say, *high wines*, *alcohol*, or *spirits*, as the case may be." It is undoubtedly true that in distillation under the improved methods of modern times a neutral spirit may be produced at a later stage of the process out of something which at an earlier stage of the process was crude whisky or so-called "high wines;" but this no more shows neutral spirit to be a "like substance" to whisky than vinegar is a "like substance" to cider or to wine, or that beef is a "like substance" to veal.

My attention has been likewise called to the case of *Taylor Company* v. *Taylor* in the Court of Appeals of Kentucky (85 S. W. R., 1085) as establishing the propriety of designating a mixture of whisky and ethyl alcohol as "a blend" or "blended." In this case it was determined that the selling of whisky mixed with neutral spirit under a label which might lead the uninitiated to suppose that it

was a "straight whisky" was a fraud upon the public as well as upon the manufacturer of the "straight" article. In its opinion the court says (p. 1088):

"The defendant may properly sell his brand of 'Old Kentucky Taylor,' provided he so frames his advertisements as to show that it is a blended whisky; but he can not be allowed to impose upon the public a cheaper article, and thus deprive appellant of the fruits of his energy and expenditures by selling his blended whisky under labels or advertisements which conceal the true character of the article, for this would destroy the value of the appellant's trade."

This decision was rendered on March 17, 1905, more than a year before the approval of the pure-food law. In speaking of a mixture of whisky and neutral spirit as "blended whisky," the court had not, of course, in mind the definition of "blend" in that law, which, as above noted, is altogether novel and arbitrary. On the other hand, the decision may have been considered by the Congress when it framed the pure-food law, and the special and original definition of "blend" given in that law may have been intended for the very purpose of making more difficult such frauds as the Court of Appeals in Kentucky condemned in this case.

I conclude, therefore, that according to the true intent of the pure-food law a mixture of whisky with neutral spirit must be deemed a "compound" and not a "blend," although the spirit may be a distillate from the same substance used to furnish the whisky, and that such a mixture stands on the same footing as a mixture of whisky and brandy or of whisky and rum.

The definition of "whisky" as a natural spirit involves as its corollary that there *can* be such a thing as "imitation whisky." If the same process were followed of which we spoke in connection with artificial wine, namely, if ethyl alcohol, either pure or mixed with distilled water, were given, by the addition of harmless coloring and flavoring substances, the appearance and flavor of whisky, it is impossible to find any other name for the product, in conformity with the pure-food law, than "Imitation whisky."

An interesting question remains, the question, in my opinion, of greatest difficulty connected with the subject, namely, whether a mixture of a liquid such as has just been described, or, indeed, a mixture of ethyl alcohol itself with whisky, ought to be labeled "Whisky," at all. When the words "compound" or "compounded" are used in the act, it is, in my judgment, *ordinarily* necessary that *two* substances at least should be mentioned as entering into the combination described; in other words, it would not be accurate to call a mixture of port and sherry "Compounded sherry" or "Compounded port;" such a mixture must be designated as "Sherry compounded with port" or "Port compounded with sherry" or "Compound of port and sherry." As above stated, this would be, to say the least, no less true if an imitation sherry were used to mix with a genuine sherry, and, at first sight, it would seem that the same reasoning would deny the name "Whisky" to a compound of "straight" whisky and ethyl alcohol whether with or without coloring and flavoring substances. There is, however, a distinction between the two cases, and it is not *universally* true that *two* substantives, at least, *must* follow "compound" or "compounded," although it is true, in my opinion, that only one substantive can appropriately follow "blend" or "blended."

In the first place, we may note that the "imitation sherry" described above would not be a wine at all, while ethyl alcohol is clearly a spirit; this distinction, however, is not essential. But, so far as I know, no practice exists in the wine trade of mixing port with sherry or genuine with artificial sherry and calling the mixture by the name of either one of its ingredients. On the other hand, there is and has been for a long time in existence a well-known practice of mixing ethyl alcohol with whisky to give the latter an artficial age, and thus produce the so-called "mellowness" of old whisky, which is caused by the gradual and partial evaporation of the essential oils contained in new whisky; and it seems to be a long and well established custom in the trade to call the mixture of whisky and alcohol thus produced "Blended whisky." For the rea-

sons above set forth, I think the law has forbidden the use of the adjective, but it is otherwise with the noun.

In the Encyclopædia Britannica of 1878, Vol. VII, under the head "Distillation," there is the following statement:

"Flat-bottomed and fire-heated stills are considered the best for the distillation of malt spirit, as by them the flavor is preserved. Coffey's still, on the other hand, is the best for the distillation of grain spirit, as by it a spirit is obtained almost entirely destitute of flavor, and of a strength varying from 55 to 70 over proof. Spirit produced of this high strength evaporates at such a low temperature that scarcely any of the volatile oils on which the peculiar flavor of spirits depends are evaporated with it, hence the reason why it is not adapted for the distillation of malt whisky, which requires a certain amount of these oils to give it its requisite flavor. The spirit produced by Coffey's still is, therefore, chiefly used for making gin and factitious brandy by the rectifiers, *or for being mixed with malt whiskies by the wholesale dealers.*"

The practice therein described has become during the past twenty-eight years much more general than it then was, in the United States as well as in Great Britain, and improvements in the art of distillation have rendered it much easier and more profitable.

As above explained, I consider "Champagne" a suitable label or brand for the composite wine known by that name. If a natural wine existed which was sweet and sparkling and also generally known as "Champagne," a mixture of the two might be, I think, appropriately called "Compound" or "Compounded champagne," and, in accordance with this analogy, I conclude that a combination of whisky with ethyl alcohol, supposing, of course, that there is enough whisky in it to make it a *real* compound and not the mere semblance of one, may be fairly called "Whisky," provided the name is accompanied by the word "Compound" or "Compounded," and provided a statement of the presence of another spirit is included in substance in the title. I am strengthened in this conclusion by understanding from the papers you have referred to me that it has been reached by the Department of Agriculture as well.

The following seem to me appropriate specimen brands or labels for (1) "straight" whisky, (2) a mixture of two or more "straight" whiskies, (3) a mixture of "straight" whisky and ethyl alcohol, and (4) ethyl alcohol flavored and colored so as to taste, smell, and look like whisky:

(1) Semper Idem Whisky: A pure, straight whisky mellowed by age.

(2) E Pluribus Unum Whisky: A blend of pure, straight whiskies with all the merits of each.

(3) Modern Improved Whisky: A compound of pure grain distillates, mellow and free from harmful impurities.

(4) Something Better than Whisky: An imitation under the pure-food law, free from fusel oil and other impurities.

In the third specimen it is assumed that *both* the whisky and the alcohol are distilled from grain.

I remain, sir,

Yours, very respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

POSTAGE STAMPS—PORTRAITS—NAMES OF INDIVIDUALS.

The Postmaster-General is not required to have the names of persons whose portraits are placed upon postage stamps inscribed below such portraits.

Postage stamps are not "securities" of the United States within the meaning of the proviso in the act of March 2, 1889 (25 Stat., 939, 945), which requires that the name of each person whose portrait shall be placed upon any of the plates for bonds, securities, notes, and silver certificates of the United States shall be inscribed below such portrait.

Postage stamps are treated as supplies for the Post-Office Department, and as coming within the terms of section 3709, Revised Statutes, respecting purchases and contracts for supplies for the Executive Departments.

DEPARTMENT OF JUSTICE,

April 13, 1907.

SIR: In response to your request for my opinion upon the question whether the name of a person whose portrait shall be placed upon a postage stamp must be inscribed below such portrait, I have the honor to reply as follows:

Section 3576, which appears in the Revised Statutes under Title XXXVIII, The Currency, provides that "no portrait shall be placed upon any of the bonds, securities, notes, fractional or postal currency of the United States, while the original of such portrait is living."

By the act of March 2, 1889 (25 Stat., 939, 945), it was provided "that hereafter the name of each person whose portrait shall be placed upon any of the plates for bonds, securities, notes, and silver certificates of the United States shall be inscribed below such portrait."

Section 3576 was taken from the deficiency act of April 7, 1866, and was a proviso to the appropriation for plates, engraving, printing, and paper for national currency notes.

The proviso in the act of 1889 for inscribing the name of each person whose portrait shall be placed upon any of the plates for printing United States evidences of indebtedness was a proviso in the section appropriating for wages of plate printers in the Department of the Treasury, to be expended under the direction of the Secretary of the Treasury. In neither of these statutes were postage stamps included in the designation of issues upon which portraits might be placed. The former expressly mentions bonds, securities, notes, fractional or postal currency, the latter certainly not embracing postage stamps. The latter expressly mentions bonds, securities, notes, and silver certificates. All of these were prepared in the Treasury Department under the direction of the Secretary.

But postage stamps are provided for in an entirely different manner. These are treated as supplies for the Post Office Department, and as coming within the terms of section 3709, Revised Statutes, which directs that "all purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same." The propriety of treating postage stamps as supplies was recognized by this Department in an opinion of Attorney-General Devens (15 Op., 226).

The uniform practice of the Post Office Department has been to obtain postage stamps after advertisement and

award in compliance with this law. I am informed that none of the work of printing the postage stamps was done in the Treasury Department until 1894; and that then, and since then, the stamps were printed in the Bureau of Engraving and Printing, when that Bureau was the successful competitor after advertisement for proposals.

By sections 3914 and 3917 Revised Statutes, the Postmaster-General shall prepare postage stamps of suitable denominations, and may from time to time adopt such improvements in postage stamps as he may deem advisable.

In view of all the legislation above cited, and the recognized practices of the Departments, it would seem that the act of 1889 was intended not to apply to postage stamps.

However, it has been suggested that, by reason of the definition contained in section 5413 Revised Statutes, the word *securities* in the act of 1889 must be construed as including postage stamps. That section is as follows:

"The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national (bank) currency, coupons, United States notes, Treasury notes, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any act of Congress."

If this construction of section 5413 is correct, it follows that wherever in the statutes of the United States the words "securities of the United States" occur, those words must have the meaning put upon the words "obligation or other security" in that section. I think this is not a correct conclusion. An examination of the context shows the meaning to be placed upon this expression. The section was adopted from the act of June 30, 1864 (13 Stat., 218, 222), and is the thirteenth section of that act. The words "now in this act" were omitted by the revisers, but the context shows that the intention of the Congress was to apply the language of this definition to the penal provisions enacted for the punishment of crimes against the operations of the Government. This appears from the

inclusion in sections 5414, 5430, and 5431, Revised Statutes, of sections 10, 11, and 12 of the act of 1864, and the further embodiment of all other statutes for similar offenses. And notwithstanding the comprehensive scope of the definition of "obligation or other security," we find the specific extension of penalties for like offenses—to the forging and counterfeiting of postage stamps, and dies, plates, and engraving therefor.

The question of the application of this section 5413 to other statutes has been presented to several of my predecessors. In considering the matter in reference to a statute providing for engraving and printing notes, bonds, and other securities of the United States, Mr. Attorney-General Griggs, in 22 Op., 40, advised the Postmaster-General that the section did not apply to and limit the meaning of the words "other securities of the United States" as used in that act. I agree with him in the reasoning and conclusions arrived at.

I am of the opinion that the Postmaster-General is not obliged to insert names of persons in connection with portraits on postage stamps.

Respectfully,

ALFORD W. COOLEY,
Acting Attorney-General.

The POSTMASTER-GENERAL.

THE PRESIDENT—RECESS APPOINTMENT—NAVAL OFFICER.

The President has power during the recess of the Senate, and pursuant to the act of March 4, 1907 (34 Stat., 1407), which authorized him, by and with the consent of the Senate, "to reinstate Leonard Martin Cox in the Corps of Civil Engineers of the Navy," to appoint Mr. Cox to the position indicated, provided such appointment be expressed to expire at the end of the next session of the Senate.

The words "may happen," in Article II, section 2, clause 3, of the Constitution, mean "may happen to exist." Therefore the President has power whenever and however a vacancy first occurred, whether by death, resignation, etc., or by the creation of a new office by act of Congress, which is an "original vacancy," to

fill the place during the recess of the Senate by a temporary appointment under a commission which shall expire at the end of the next session of the Senate.

The salary or compensation of a person so appointed can not be paid, "if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate." (Sec. 1761, Rev. Stat.)

DEPARTMENT OF JUSTICE,
April 17, 1907.

SIR: In your letter of April 15 you submit the act of March 4, 1907, "to reinstate Leonard Martin Cox in the Corps of Civil Engineers of the Navy," by which the President was "authorized to restore, by and with the advice and consent of the Senate, Mr. Cox to the Corps of Civil Engineers," etc., and you ask whether the Navy Department "should during the recess of the Senate present to the President, with request for his signature, a commission appointing Mr. Cox a civil engineer in the Navy under special act of March 4, 1907."

The power of the President under the Constitution is "to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of the next session." The great weight of authority is that in reference to *any* vacancy, whether occurring by death, resignation, etc., or by the creation of a new office by act of Congress, which is an "original vacancy," the words "may happen" mean "may happen to exist;" and therefore, whenever and however the vacancy first occurred, it may be filled during the recess by a temporary appointment under a commission which shall expire at the end of the next session of the Senate. (12 Op., 455; 16 Op., 522; 19 Op., 261.) The theory is that the President does not fill the *office* without the concurrence of the Senate, but may fill the *vacancy* in the recess, yet only by an appointment which lasts until the end of the next session. (12 Op., 32, 41.)

It is, however, to be borne in mind that under section 1761, Revised Statutes, the salary or compensation of a person so appointed may not be paid, "if the vacancy

existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate." That is this case, of course, for the vacancy arose and existed while the Senate was in session, although it continues to exist in the subsequent recess.

I have, therefore, the honor to answer your question in the affirmative, pointing out again, however, that Mr. Cox's commission, since the appointment will be a recess appointment, must be expressed to expire at the end of the next session of the Senate.

Very respectfully,

HENRY M. HOYT,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

NOTARIES PUBLIC—SECTION 558, CODE OF THE DISTRICT OF COLUMBIA.

The proviso in the act of June 29, 1906 (34 Stat., 622), amending section 558 of the Code of the District of Columbia, which provides that no notary public shall be authorized to take acknowledgments, etc., or perform any official act in connection with matters in which he is employed as counsel, etc., before any of the Executive Departments, applies not only to local attorneys, but to all notaries who practice before the Departments.

DEPARTMENT OF JUSTICE,
April 18, 1907.

SIR: I duly received your request for my opinion whether the "proviso" in the recent act of Congress (34 Stat., 622), amending section 558 of the Code of the District of Columbia applies to local notaries only or to notaries throughout the country. Briefs on both sides of the question and an opinion of the Assistant Attorney-General for your Department accompanying your letter have been carefully considered by me.

Section 558 before amendment was as follows:

"Notaries: The President shall also have power to ap-

point such number of notaries public, residents of said District, as, in his discretion, the business of the District may require."

The amendatory act, complete, is as follows:

"AN ACT To amend section five hundred and fifty-eight of the Code of Law for the District of Columbia.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section five hundred and fifty-eight of the Code of Law for the District of Columbia, relating to notaries public, be amended by adding at the end of said section the following: '*Provided*, That the appointment of any person as such notary public, or the acceptance of his commission as such, or the performance of the duties thereunder, shall not disqualify or prevent such person from representing clients before any of the Departments of the United States Government in the District of Columbia or elsewhere, provided such person so appointed as a notary public who appears to practice or represent clients before any such Department is not otherwise engaged in Government employ, and shall be admitted by the heads of such Departments to practice therein in accordance with the rules and regulations prescribed for other persons or attorneys who are admitted to practice therein: *And provided further*, That no notary public shall be authorized to take acknowledgments, administer oaths, certify papers, or perform any official acts in connection with matters in which he is employed as counsel, attorney, or agent in which he may be in any way interested before any of the Departments aforesaid.'"

Do the words "no notary" in the last sentence mean *no notary of the District of Columbia*, or is the prohibition general? This question is not altogether free from difficulty.

It appears probable that this second proviso was added to the bill to meet an objection raised by the Secretary of the Treasury and the Comptroller, which is thus stated by the latter officer:

"Persons who are notaries public and not Government employees may, in the business represented by them as attorneys before the Departments, act as notaries—e. g., have executed before them affidavits and powers of attorney—in cases in which they are acting as attorneys in

claims before the Departments. Such practice, in my opinion, would open the doors to fraud and deceit."

I do not see that any sufficient reason exists for limiting the prohibition contained in this proviso to notaries public of the District of Columbia; the practice it was intended to prevent is no less objectionable on the part of other notaries than on theirs. Doubtless the law was originally intended to remove a legal disability which affected only notaries of the District. But it must be remembered that the one legislative body, by one method of lawmaking at one and the same sitting, enacts laws for at least three different classes of business in the District. It makes laws to be applied by the Executive Department, situated in the District, to the whole country; it makes laws to regulate the practice and management of those Executive Departments themselves; and it is the legislature of the District considered as a quasi Territory. There is no constitutional or other legal obstacle to the embodiment of laws of all three kinds in one act.

Such being the case, when debate or committee deliberation may suggest a wise and needed rule of law, so busy a body as the Congress may be unwilling to postpone its enactment merely to effect a logical separation of subjects among these three classes. The Senate added this final proviso to the bill after it had passed the House.

The amendatory law not only deals with notaries of the District, but also with the practice and management of the Executive Departments and with the relations of notaries to that practice.

The attention of the Congress being thus directed to the subject of departmental practice, it seems, to my mind, reasonable to believe that when it said "no notary public" shall act as such in cases in which he is attorney before any of the Departments, it meant what it said; that is to say, it intended to embrace all the notaries who could practice before those Departments.

The fact that the enactment took the form of a proviso in an act relating in other respects to notaries of the District is unquestionably entitled to weight; but it is not decisive. Had Congress intended to restrict the operation

of the proviso to notaries of that District, it could have inserted the word "such" or some equivalent qualifying expression, as it actually did in the body of the act. Not having done this, I feel bound to assume it acted advisedly and intended to say what it said in fact. Therefore, although there may be room for a reasonable divergence of views in the premises, I am, on the whole, of the opinion that the proviso applies to all notaries who may practice before the Departments.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE INTERIOR.

COURT-MARTIAL — DESERTION — DISAPPROVAL OF SENTENCE.

Where the sentence of a court-martial which found a soldier guilty of desertion was disapproved by the proper reviewing officer, being deemed inadequate, and the soldier ordered, at his own expense, to join his regiment, such disapproval operated, under article 104 of the Articles of War, as an acquittal of the charge, and, as the term of enlistment had expired, there was no warrant for ordering him to further duty. Having been legally tried, he can not be again tried or any other sentence imposed for that offense.

The disapproval of the sentence of a properly constituted court-martial by the proper reviewing authority is, in legal effect, tantamount to an acquittal of the accused by the court of the offense charged, and relieves him from any and all laibilities to which his conviction would have subjected him.

Article 48 of the Articles of War applies to a soldier who has been convicted of desertion or, having deserted, is restored to duty without trial, which carries with it an acknowledgment on his part of the fact of desertion, but does not apply to a soldier who, after trial and conviction, has been ordered to duty after the sentence has been expressly disapproved by the proper reviewing officer.

DEPARTMENT OF JUSTICE,

April 25, 1907.

SIR: I have the honor to respond to the request in your note of April 11, 1907, for an expression of my opinion upon the case there presented, in substance, as follows:

On May 11, 1903, Private Gustave Liesendahl enlisted

in the Army to serve for three years. On September 14, 1904, he deserted, and surrendered himself May 31, 1906, twenty-one days after the period of his enlistment had expired. He was tried by court-martial and found guilty upon his plea of desertion and was sentenced to be dishonorably discharged. The reviewing authority disapproved the sentence, deeming it inadequate, and directed that Private Liesendahl be released from confinement and sent, at his own expense, to join his proper station.

The question you submit is this: "Whether, in view of the virtual acquittal of Private Liesendahl by the action of the reviewing authority in disapproving the sentence, and of the fact that Private Liesendahl's term of enlistment had expired, it was lawful to hold him to duty."

The forty-eighth article of war, which applies in this case, is as follows:

"Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried."

And article 104 provides that—

"No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being."

The Judge-Advocate-General of the Army, following a line of opinions of that office extending through a period of many years, has held in this case, in substance, that the disapproval by the reviewing authority of the sentence of the court-martial, operated under above article 104 as an acquittal of Liesendahl of the charge of desertion, and that, as his term of enlistment had then expired, he should have been discharged, and could not be by the reviewing authority ordered to complete his term of service under above article 48.

The commander of the Department of the East, the reviewing authority in this case, does not agree that this dis-

approval of the sentence of the court-martial was tantamount to an acquittal of the accused, and especially contends that, whether this be so or not, he still had authority under this article 48 to order him back to complete his term of service.

And, speaking of this article, you inform me that "this article has been held by the War Department to be a penal statute and therefore to be strictly construed. The article has been held to apply, and the penalty of making good the time lost to be operative, where a soldier has been tried and found guilty of desertion, but not separated from the service in pursuance of a sentence, or where a soldier, having deserted, is restored to duty without trial, this carrying with it an acknowledgment on the part of the soldier of the fact of his desertion and the acceptance of the provision of the article of war."

And this is in accordance with various opinions of Judge-Advocates-General of the Army.

I think it must be considered as settled law that where the sentence of a properly constituted court-martial is expressly disapproved by the proper reviewing authority, this is, in legal effect, tantamount to an acquittal of the accused by the court of the offense charged, and relieves him from any and all liabilities to which his conviction would have subjected him. (13 Op., 459; 1 Winthrop, Mil. Law and Pro. (2d ed.), p. 690, et seq.; Dig. Opin., J. A. G., pars. 64, 1157, 2229, 2320.)

In 13 Op., *supra*, it is said on page 460:

"The inquiry then remains, what is the effect of the disapproval of the sentence and the order thereupon by the reviewing officer. The uniform practice of the Government seems to have been to regard such action by the reviewing officer as tantamount to an acquittal by the court itself, and it can not be doubted that such is the effect of the order of the reviewing officer in this case."

The one hundred and second article of war provides that "no person shall be tried a second time for the same offense."

Indeed, so absolutely are those proceedings an acquittal, in legal contemplation, that they may be pleaded as an

acquittal in bar of a second trial. (1 Winthrop, M. L., 387 and 389.) He has been none the less tried when the reviewing authority disapproves the sentence. (1 Winthrop, M. L., p. 389.) And, as it is entirely certain that no power can, after that, impose or execute any sentence as a result of that trial, it follows that such proceedings are, in legal effect, a trial and acquittal of the accused.

But it is urged that, even if this be so, still the forty-eighth article of war authorizes the ordering of a deserter to make good by service the time lost in his desertion; that this is entirely independent of any conviction or sentence for desertion, and may be ordered whether the accused is tried for desertion or not; that this is a mere contractual matter between the Government and the soldier, arising under his contract to serve for a specified time, and that courts-martial do not sit to pass upon such civil or contractual questions, and the decision of the Comptroller in 12 Comp. Dec., 328, is relied upon.

Several answers might be made to this contention, but a single one will suffice.

The only authority for ordering the man Liesendahl back to duty after his trial and the disapproval of his sentence for desertion, and after his term of enlistment has expired, is article 48 above quoted. But this, in express terms, refers only to a "soldier who deserts." But here the soldier was tried for and, in legal effect, acquitted of desertion. Therefore, this article does not refer to him. And, in any case, before this provision can be carried into effect after the soldier's term of enlistment has expired, either he must be convicted of the desertion or, having deserted, he is restored to duty without trial, which, as you state in substance, may be taken as his admission of desertion and his acceptance of the provision in this article.

The decision of the Comptroller in 12 Comp. Dec., 328, is not believed to affect the question here. That decision had relation to the question whether, by reason of his virtual acquittal in such a case as this, the pay of the soldier continued during the period of his desertion. Inasmuch as the pay of a soldier may depend upon his performance of his contract of enlistment, it might be held, as it was

there, that, even though virtually acquitted of the crime of desertion, still, as he had performed no service during that time, he was not entitled to pay therefor, without at all challenging the conclusion here reached, that such disapproval is a virtual acquittal of the charge of desertion; or that one who has been thus acquitted can not, after his term has expired, be ordered to duty under article 48 of the Articles of War. The question of pay during a period of desertion, and when the sentence therefor has been disapproved, is not before me, and I express no opinion upon it.

I am of opinion that Private Liesendahl was legally tried for the crime of desertion, and, as he can not be again tried or any other sentence be imposed for that offense, the disapproval, by the reviewing authority, of the sentence of the court that tried him operated as his acquittal of the charge, and, as his term of enlistment had expired, there was no warrant for ordering him to further duty. He should have been discharged.

Respectfully,

HENRY M. HOYT,
Acting Attorney-General.

The SECRETARY OF WAR.

PRIBILOF ISLANDS — PELAGIC SEALING — AUTHORITY OF AGENTS OF THE DEPARTMENT OF COMMERCE AND LABOR TO MAKE ARRESTS.

The agents of the Department of Commerce and Labor have power under section 174 of the act of March 3, 1899 (30 Stat., 1280), upon reasonable ground for suspecting that a violation of the laws for the protection of the Alaska seal fisheries has occurred, to search any vessel within the 3-mile limit, according to the practice of customs officers when acting under section 3059, Revised Statutes, and to seize such vessels and any property on board. They may also make arrests of persons on board such vessels reasonably believed to be guilty of a crime, and need not previously obtain a warrant.

In like manner, arrests and seizures may be made on land when probable cause exists to believe a criminal offense has been committed.

Sealskins reasonably believed to have been acquired as the fruits of such crime may be seized either upon land or at sea within the 3-mile limit.

DEPARTMENT OF JUSTICE,
May 3, 1907.

SIR: I have received your letter of the 30th ultimo setting forth certain facts and laws concerning the Pribilof Islands and fur seals and asking my opinion, as follows:

"I have the honor to submit for your consideration the question whether, under existing law, and especially under section 174 of the act of March 3, 1899 (30 Stat., 1280), which reenacts in part section 1957 of the Revised Statutes, the Secretary of this Department may authorize the agents of this Department charged with the management of the Alaska seal fisheries to make arrests on the Pribilof Islands for violation of the laws for the protection of the said fisheries. * * * Recently these islands have been surrounded by a greatly increased number of pelagic schooners which have displayed unusual activity in taking seals close to the shores of the islands. In view of this fact, it is desirable to furnish the agents with more explicit instructions regarding the making of arrests than hitherto."

I understand that you desire to know whether section 174 of the act referred to, or any other statute, authorizes the agents you mention to make arrests of persons and seizures of property, especially vessels, for the purpose of enforcing the provisions of law to which you call especial attention, and if so, how and under what circumstances. The statutory provisions in question are—

"Section 1956, Revised Statutes (act March 3, 1899, sec. 173), which prohibits the killing, among other animals, of any fur seals within the limits of Alaska Territory.

"Section 1959, Revised Statutes (act March 3, 1899, sec. 176), which declares the islands of St. Paul and St. George a Government reservation and makes it unlawful for any person to land or remain there except by authority of the Secretary of Commerce and Labor.

"Section 1960, Revised Statutes (act March 3, 1899, sec. 177), which makes it unlawful to kill any seals on these

islands except during certain months or by the use of fire-arms, etc.

"Section 1961, Revised Statutes (act March 3, 1899, sec. 178), which prohibits the killing of any female seals or any seals under one year of age, the killing of seals in the water around the islands or on the beaches, cliffs, or rocks where they haul up from the sea to remain."

Section 174 of the act of March 3, 1899, reads as follows:

"That the collector or deputy collectors appointed for Alaska Territory, and any person authorized in writing by either of them or by the Secretary of the Treasury, shall have power to arrest persons and seize vessels and merchandise liable to fines, penalties, or forfeitures under this and the other laws extended over the Territory and to keep and deliver the same to the marshals."

Section 174 above quoted is identical with the middle part of Revised Statutes, section 1957, which was originally adopted in 1868, immediately after the United States acquired the Territory of Alaska from Russia.

Section 1957 appears in the Revised Statutes as part of a chapter entitled "Provisions relating to the unorganized Territory of Alaska." The first section of the chapter provides that the laws of the United States relating to customs, commerce, and navigation are extended over the mainland, islands, and waters of the Territory. That chapter further provides for the restriction by the President of the importation of fire-arms and distilled spirits, and for their forfeiture and the forfeiture of the vessel on which they may be found, with her tackle, etc., and provides a fine and imprisonment for willfully violating the President's regulations upon the subject. The killing of otter, mink, etc., is forbidden under penalty of fine and imprisonment and forfeiture of vessels; and other sections of the chapter forbid the killing of seals during certain months and the killing of female seals under penalty of fine and imprisonment and forfeiture of vessels, etc. A number of sections of this chapter are embodied in the criminal code of Alaska in connection with section 174, above quoted. These sections were chiefly taken from the same act of 1868 and an act of 1870.

It is unnecessary to inquire whether Congress, by retaining in section 174 of the criminal code of Alaska the original language, "fines, penalties, and forfeitures under this and the other laws extended over the Territory," intended to authorize agents of the Treasury to arrest persons and seize goods, etc., for all offenses under that code, notwithstanding its provisions relating to arrests by marshals and other officers; we are concerned here exclusively with some of the ends originally sought by Congress when in 1868 and 1870 it enacted the laws of those years.

The arrests and seizures then authorized were to be made in a wild region where no legal machinery existed for arresting, bailing, seizing, or trying offenders against the laws; and the succeeding prosecutions were to take place in the far-distant district courts of California, Oregon, or Washington under United States Revised Statutes, section 1957. Such arrests and seizures by these agents were evidently authorized by analogy to the summary seizures by customs officers and other agents of the Treasury Department, for the laws regulating customs duties, commerce, and navigation were extended over the Territory of Alaska by the same act of 1868, which contains the language now found in section 174 of the act of 1899. It could not have been expected that warrants would be obtained before such powers should be exercised in places so remote and unsettled. Like powers have long been exercised in the Indian country by the military officers and Indian agents under section 2150 of the Revised Statutes.

I find no reason to doubt the constitutionality of laws conferring such powers when intended to be exercised in wild districts in which there exists no adequate and regular machinery for the enforcement of the law.

If your agents reasonably suspect that a violation of the law has occurred, in my opinion they have power to search any vessel within the 3-mile limit, according to the practice of customs officers when acting under section 3059 of the Revised Statutes, and to seize such vessels and any property aboard in like manner. They may also make arrests of persons on board such vessels reasonably believed

to be guilty of a crime, and need not previously obtain any warrant.

In like manner, arrests and seizures may be made on land when probable cause exists to believe a criminal offense has been committed. Seal-skins reasonably believed to have been acquired as the fruits of such crime may, of course, be seized either upon land or at sea within the 3-mile limit.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF COMMERCE AND LABOR.

APPOINTMENT — HOLDING OF TWO OFFICES — COMMISSIONER OF LABOR.

The appointment of the Commissioner of Labor as a member of the Immigration Commission provided for by section 39 of the act of February 20, 1907 (34 Stat., 898, 909), is not an appointment to an "office" within the meaning of section 2 of the act of July 31, 1894 (28 Stat., 205), and he may receive compensation for his services on that Commission in addition to the salary attaching to his office as Commissioner of Labor.

DEPARTMENT OF JUSTICE,

May 6, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of April 29, in which you inform me that you have appointed Commissioner of Labor Charles P. Neill a member of the Immigration Commission provided for under section 39 of the act of February 20, 1907 (34 Stat., 898, 909). You ask my opinion upon the question whether or not such appointment is an office within the meaning of the statute prohibiting the appointment to or holding of an office by any person while holding an office with a compensation of over $2,500, and whether Commissioner Neill may be given additional compensation for his services on the Immigration Commission.

The act of February 20, 1907, creating that Commission provides as follows (sec. 39):

"That a commission is hereby created, consisting of three Senators, to be appointed by the President of the Senate, and three members of the House of Representatives, to be appointed by the Speaker of the House of Representatives, and three persons to be appointed by the President of the United States. Said commission shall make full inquiry, examination, and investigation by sub-committee or otherwise into the subject of immigration. For the purpose of said inquiry, examination, and investigation, said commission is authorized to send for persons and papers, make all necessary travel, either in the United States or any foreign country, and, through the chairman of the commission or any member thereof, to administer oaths and to examine witnesses and papers respecting all matters pertaining to the subject, and to employ necessary clerical and other assistance. Said commission shall report to the Congress the conclusions reached by it and make such recommendations as in its judgment may seem proper. Such sums of money as may be necessary for the said inquiry, examination, and investigation are hereby appropriated and authorized to be paid out of the 'immigrant fund,' on the certificate of the chairman of said commission, including all expenses of the commissioners and a reasonable compensation, to be fixed by the President of the United States, for those members of the commission who are not Members of Congress. * * *"

The statute referred to by you, which forbids the holding of two offices by persons receiving a salary of $2,500, is the act of July 31, 1894 (28 Stat., 205), section 2 of which provides:

"No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation is attached, unless specially heretofore or hereafter specially authorized thereto by law * * *."

There have been many judicial definitions of a public office. In the leading case of *United States* v. *Hartwell*, 6 Wall., 385, 393, the Supreme Court said: "An office is a

public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of the defendant was in the public service of the United States. * * * His compensation was fixed by law. * * * His duties were continuing and permanent, not occasional or temporary." This definition has been often cited and approved. (*United States* v. *Moore*, 95 U. S., 762; *United States* v. *Germaine*, 99 U. S., 511; *Hall* v. *Wisconsin*, 103 U. S., 8; *Auffmordt* v. *Hedden*, 137 U. S., 327.)

Office has also been defined as authority to exercise a function of government, as implying a delegation of a portion of the sovereign power to the person filling the office. (Opinion of the judges, 3 Greenl. (Me.), 461; *Eliason* v. *Coleman*, 86 N. C., 235, quoting from High Ex. Rem., sec. 620.)

But the idea runs through all the cases that in order to constitute an office the employment must be continuing and not temporary. Chief Justice Marshall expresses that view in *United States* v. *Maurice*, 2 Brock., 96, as follows:

"A man may certainly be employed * * * without becoming an officer. But if a duty be a continuous one, which is defined by rules prescribed by the Government and not by contract, which an individual is appointed by government to perform, * * * if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge of employment from an office."

It was held by one of my predecessors in a somewhat analogous case (22 Op., 184) that the word "office" as used in the act of 1894 did not include the appointment of a circuit judge as commissioner under the convention of 1896 with Great Britain, concerning claims growing out of seizures of vessels in Bering Sea. Although this conclusion was based mainly on the theory that such an appointment was not a constitutional office, it was also held that the temporary character of the employment, which was to terminate at the end of the examination of a certain number of specified claims, "withdraws one of the elements of an office which the Supreme Court regards as essential."

In *United States* v. *Germaine*, 99 U. S., 508, where the court found in the case of a surgeon in the Pension Office that his duties were not continuing and permanent, but occasional and intermittent, and that no regular appropriation was made to pay his compensation, which was paid out of money appropriated for paying pensions in his district, it was held that he was not an officer of the United States.

Applying these tests to the present case, I think it must be held that the appointment of Commissioner Neill on the Immigration Commission does not constitute an office in the sense in which the term is used in the statute under consideration. Here the tenure and duration are limited to the accomplishment of a specific act. The commissioners are to make an investigation into the subject of immigration, and it is assumed that their duties will cease when they have made the report to Congress contemplated by the act. Thus the employment is not permanent and continuous. Nor is their compensation fixed by law; as in the Germaine case, no regular appropriation is made for that purpose, but they are to be paid out of the "immigrant fund" on the certificate of the chairman of the commission, the President to fix a "reasonable compensation."

I therefore answer your inquiry by advising you that, in my opinion, Commissioner Neill's appointment as a member of the Immigration Commission is not an office within the meaning of section 2 of the act of 1894, and that he may receive compensation for his services on said commission in addition to the salary attaching to his office as Commissioner of Labor.

Very respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

MEXICAN BOUNDARY—DIVERSION OF THE RIO GRANDE.

The authority of the International Water Boundary Commission, under the convention of 1889 (26 Stat., 1512) with Mexico, is restricted to the determination of questions respecting the boundary alone, and does not extend to the adjudication of private rights and liabilities.

The Commission having found that the American Rio Grande Land and Irrigation Company, by the construction of its works, which changed the channel of the Rio Grande at a point forming the boundary line between the United States and Mexico, violated the stipulations of that treaty, the judgment is binding upon both countries, and the Commission is *functus officio* as regards the carrying into effect of their decision.

The Federal statutes (sec. 563, Rev. Stat., and act of August 13, 1888, sec. 1; 25 Stat., 433) provide a right of action and a forum to citizens of Mexico who have been injured by the action of the irrigation company.

It is the duty of the United States to vindicate the injury done to Mexico regarding the boundary line, and to that end the United States may proceed by bill in equity to obtain mandatory relief in some appropriate form to compel the restoration of the *status quo ante.*

Opinion of Attorney-General Harmon (21 Op., 274) distinguished.

DEPARTMENT OF JUSTICE,
May 16, 1907.

SIR: Your letter of April 20 submits certain findings of the International Water Boundary Commission, and requests my opinion as to whether or not the present statutory provisions enable the findings of the Commission to be given effect.

The Commission investigated a complaint by the Mexican authorities in relation to the diversion of the waters of the Rio Grande by the American Rio Grande Land and Irrigation Company on the American side near Horcon ranch, Mexico, and found:

"That the said American Rio Grande Land and Irrigation Company did wrongfully and knowingly cause a change in the current channel of the Rio Grande where it constituted the boundary line between the United States of Mexico and the United States of America, by artificial means, and in direct violation of Article III of the convention of November 12, 1884, between the two governments, and if said Article III is applied, the change in the running channel of the river produces no alteration of the boundary line, which still continues in the old bed of the river.

"The Commissioners are of opinion that indemnity should be made for this wrong, but they do not understand that the treaties under which it was organized and

under which this investigation was conducted confers upon it jurisdiction over the title to land, damage to property, the control of riparian rights, or the enforcing of reparation for wrongs by offenders for changing the channel of the river where it constitutes the boundary."

The boundary convention of 1889 with Mexico gives to the International Boundary Commission exclusive jurisdiction to decide the differences and questions growing out of natural or artificial changes in the beds of the Rio Grande and Colorado rivers where they form the boundary line between the United States and Mexico. The authority of the Commission under that treaty is restricted to the determination of questions respecting the boundary alone, and does not extend to the adjudication of private rights and liabilities. The Commission has found here, within its jurisdiction, that the American Rio Grande Land and Irrigation Company, by the construction of its works changing the channel of the river, violated the stipulations of that treaty, which refers to and incorporates the stipulations of earlier treaties.

Both Commissioners having agreed to this finding or decision, their judgment is binding upon both countries by the express provision of Article VIII of that treaty. Manifestly the Commission is *functus officio* in this matter, and the question is, how can their decision be carried into effect?

The question of suspending the construction of prohibited works, which is authorized and directed by the treaty, does not arise here, because it appears from the report of the joint engineers that the work had progressed so far as to be beyond control.

As to indemnity for injuries which may have been caused to citizens of Mexico, I am of opinion that existing statutes provide a right of action and a forum. Section 563, Revised Statutes, clause 16, gives to district courts of the United States jurisdiction "of all suits brought by any alien for a tort only in violation of the law of nations or of a treaty of the United States." The act of August 13, 1888, amending and superseding earlier laws (25 Stat., 433, sec. 1), gives to the circuit courts of the United

States "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity * * * in which there shall be * * * a controversy between citizens of a State and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid [$2,000]."

I repeat that the statutes thus provide a forum and a right of action. I can not, of course, undertake to say whether or not a suit under either of the foregoing statutes would be successful. That would depend upon whether the diversion of the water was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty, and could only be determined by judicial decision. In a case where the diversion of water for irrigation occurred within the United States above the point where the Rio Grande becomes the international boundary, Attorney-General Harmon held that the United States is under no obligation or liability by treaty or the principles of international law, but he did not consider a diversion, as here, where the river is the boundary, nor the liability of private parties in such case.

As to the public tort, so to speak—that is, the injury to Mexico in respect to the boundary line by changing the channel of the river—I incline to the view that a treaty of the United States, which is part of the supreme law of the land, having been violated, a remedy exists to redress that wrong. The United States owes the duty and has the right of vindicating the treaty. It can hardly be doubted that in a proper case calling for prevention the United States may proceed by bill in equity to obtain an injunction, and that in a case like the present, where the prohibited thing has been done, the United States may proceed in the same way to obtain mandatory relief in some appropriate form to compel the restoration of the *status quo ante*. I find provision for this course in the act of 1888, already referred to. That act gives jurisdiction to the circuit courts of the United States of all suits of a civil nature at common law or in equity in which the United States are plaintiffs or petitioners. I am of the opinion that the limitation of

jurisdictional amount in that act does not apply to such suits.

Whether, in view of all the circumstances and the effect upon the various Mexican as well as American interests involved, it is wise or expedient for the United States to file a bill against the offending corporation to compel the restoration of the river channel as it was is not a matter for me determine, although it is undoubted that the question whether legal proceedings should actually be undertaken is finally referable to me. Awaiting an expression of your views upon this point, I have the honor to remain,

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF STATE.

CIVIL SERVICE—TRANSFER OF CLERKS AND EMPLOYEES.

The three years' limitation as to transfers in the Executive Departments, prescribed by section 5 of the appropriation act of June 22, 1906 (34 Stat., 389, 449), does not apply to employees and subordinates in post-offices, pension agencies, customs-houses, ordnance establishments, sub-treasuries, navy-yards, and quartermasters' establishments.

The language of that act imports that the persons to which it applies are actually *in* the Departments at the seat of government, or that the performance of duties away from such Departments is by direct orders from and under supervision by those Departments.

The rule laid down by Attorney-General Devens in 15 Op., 262, 267, as to what bureaus and offices may be deemed bureaus and offices in any of the Executive Departments, approved and held applicable.

Although debates in Congress are not appropriate sources of information from which to discover the meaning of an act of Congress, yet the Supreme Court has, on occasion, examined the reports of committees of either House with a view to determining the scope of statutes passed on the strength of such reports. (*United States* v. *Binns*, 194 U. S., 486, 495.)

DEPARTMENT OF JUSTICE,

May 17, 1907.

SIR: I have the honor to acknowledge receipt, by reference from you, of the request of the Civil Service Commission for my opinion on the effect of section 5 of the legis-

lative, executive, and judicial act approved June 22, 1906. (34 Stat., 389, 449.)

This section reads as follows:

"It shall not be lawful hereafter for any clerk or other employee in the classified service in any of the Executive Departments to be transferred from one Department to another Department until such clerk or other employee shall have served for a term of three years in the Department from which he desires to be transferred."

In an opinion construing this section, submitted to you under date of March 29 last (*ante*, p. 209), I advised you, (1) that clerks or other employees actually on duty at the seat of government in any one of the nine Departments referred to in section 158, Revised Statutes, as amended, were within the prohibition of the statute; (2) that clerks and other employees under the immediate control of the Departments mentioned above, even if employed usually or invariably outside the City of Washington, were also within the prohibition of the act; and (3) that the Interstate Commerce Commission, the Civil Service Commission, the Isthmian Canal Commission, the Philippine Commission, and certain other governmental agencies, which I enumerated, were not attached to any Department within the meaning of the act quoted, and that employees could be transferred to or from these offices without regard to the three year restriction.

The Civil Service Commission now asks for a supplemental opinion as to whether this section applies to persons in the classified service in offices under the supervision of one of the nine Executive Departments, but established and located outside such Departments. As examples of the classes of persons referred to, the Commission instances employees and subordinates in post-offices, pension agencies, custom-houses, ordnance establishments, sub-treasuries, navy-yards, and quartermasters' establishments.

In the opinion which has been followed for thirty years as laying down the proper rule for executive guidance, Attorney-General Devens said (15 Op., 262, 267):

"The several Executive Departments are by law established at the seat of government: they have no existence

elsewhere. Only those bureaus and offices can be deemed bureaus and offices in any of these Departments which are constituted such by law of its organization. The Department, with its bureaus or offices, is in the contemplation of the law an establishment distinct from the branches of the public service and the offices thereof which are under its supervision. Thus, the office of postmaster, or of collector of internal revenue, or of pension agent, or of consul, is not properly a *Department* office—not an office *in* the Department having supervision over the branch of the public service to which it belongs. True, an official relation exists here between the office and the Department, one, moreover, of subordination of the former to the latter; but this does not make the office a part of the Department."

While this opinion, as I have pointed out in my former communication to you above referred to, does not apply to special agents, inspectors, etc., who in contemplation of law are part of the Department proper, it obviously has application to the various classes mentioned in the letter of the Civil Service Commission.

While Attorney-General Devens was discussing the right to use franked envelopes, and we are here concerned with the subject of transfers in the classified service, it seems clear that the reasons which led to the ruling I have quoted are applicable here.

The section now under consideration, as has been observed, was a provision in the legislative, executive, and judicial act approved June 22, 1906. In the course of the debate in the House a criticism was made that the bureaus of every Department of the Government were competing against each other by offering to clerks an increase of wages to come from one Department to another. Mr. Tawney, chairman of the committee reporting the bill, said:

"If the gentleman will permit me, if he has read this bill he has observed that the committee has reported a provision for the accomplishment of that identical purpose by prohibiting the transfer from one Department to another Department until the clerk desiring the transfer has served at least three years in the Department from which he desires to be transferred." (Cong. Rec., vol. 40, part 4, p. 3928, 59th Cong., 1st sess.)

In the case of *United States* v. *Binns* (194 U. S., 486, 495), the court, speaking through Mr. Justice Brewer, said:

"* * * While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, * * * yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports."

The statement of the chairman, explaining the purpose of the legislation, was really the report of the committee within the spirit of the rule here laid down. The meaning of the statute was definitely declared. By the specification of *clerk* it would seem that, primarily, the intention of the legislature was to discourage and render more difficult the transfers of persons in clerical positions from one Department to another, and that the general words "other employee" were inserted to prevent a possible failure to accomplish the purpose sought. Be that as it may, the limitation of the statute as to persons was advisedly made. These persons must be in the classified service in the Executive Departments. This language imports that the persons are actually in the Departments at the seat of Government or that the performance of duties away from the Departments is by direct orders from the supervision by the Departments at the seat of Government.

These views are in full accord with my previous opinion, and I think the extent of that opinion should not be enlarged. They are based upon well-settled rules of construction, and there appears to be no ambiguity in the terms of the statute.

Answering your inquiry specifically, then, I am of opinion that the three-year limitation, as to transfers, of section 5 of the appropriation act of June 22, 1906, does not apply to persons referred to in the communication of the Commission or to persons occupying similar positions.

Respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

AREAS OF FORBIDDEN ANCHORAGE—AUTHORITY TO ESTABLISH.

There is no general authority under existing law conferred on any Executive Department to establish areas of "forbidden anchorage" in the harbors of the United States.

A criminal statute (act of July 7, 1898, 30 Stat., 717), which punishes willful or malicious injury to the harbor-defense system of the United States and intentional violation of any regulation of the War Department respecting the same, can not be taken as a grant of power to make regulations on the subject in question, however important and desirable such regulations may be.

The Attorney-General concurs in the view that general legislation by Congress is necessary for the protection of submarine cables connecting the several military stations in the various fortified harbors of the United States.

DEPARTMENT OF JUSTICE,
May 24, 1907.

SIR: I am in receipt of your note of May 16, 1907, in which you refer me to five acts of Congress authorizing the Secretary of War and the Secretary of Commerce and Labor, respectively, to establish anchorage regulations in the localities named in said acts. Those acts are:

"The act of May 16, 1888, for New York Harbor, extended in the act of March 3, 1899, to include Kill van Kull, Newark Bay, Arthur Kill, and Raritan Bay;

"The act of February 6, 1893, for Chicago Harbor and the waters of Lake Michigan adjacent thereto;

"The act of June 6, 1900, for Kennebec River, near Bath, Me.; and

"The act of April 26, 1906, for St. Marys River and other channels connecting the Great Lakes."

You state that in the matter of the protection of submarine cables connecting the several military stations in the various fortified harbors of the United States it is important that areas of "forbidden anchorage" should be established to cover them, and you request to be advised whether, beyond such specified acts, "under existing law there is any general authority conferred on any Executive Department to establish areas of 'forbidden anchorage' in the harbors of the United States."

The acts cited give authority to define and establish anchorage grounds in the waters specified, to adopt suitable rules and regulations in relation thereto, and to take all necessary measures for the proper enforcement of such rules and regulations. Congress has not enacted any general legislation of this character, and the fact that legislation for particular localities has been enacted excludes the idea that a general power in the matter may be implied or deduced from other powers conferred upon the Executive Departments.

The act of February 29, 1888 (25 Stat., 41), protects submarine cables through civil and criminal liability for injuries to the same, in pursuance of the convention of March 14, 1884 (24 Stat., 989), which obviously relates to international cables only. The act of 1888 (sec. 12) is restricted to cables to which the convention applies, although it embraces injuries (sec. 13) within as well as outside the territorial waters of the United States. It would seem clear that the act does not relate to domestic Government cables maintained in connection with military stations in fortified harbors, and at all events the act furnishes no authority for establishing anchorage areas " for the protection of cables or any other United States interests."

The act of July 7, 1898 (30 Stat., 717), enacted for the protection of harbor defenses and fortifications, punishes willful or malicious injury to the harbor-defense system of the United States and intentional violation of any regulation of the War Department respecting the same. But, for the reasons already given, it is plain that this criminal statute can not be taken as a grant of power to make regulations on the subject in question, however important and desirable such regulations may be.

I concur, therefore, in your view that it is necessary to procure general legislation along the lines of the special legislation referred to, and I have the honor to answer your inquiry in the negative.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

CIVIL SERVICE—ELIGIBILITY—MEMBERS OF THE SAME FAMILY.

The Civil Service Commission can not refuse to examine an applicant upon the ground that he may subsequently be disqualified for appointment under section 9 of the civil-service act of January 16, 1883 (22 Stat., 406), but it may inform persons to whom appointments could not be tendered at the time of examination that unless the disability is removed before their names are reached for certification, they can not be certified.

The Commission is authorized and required to withhold from certification the name of any person where two or more members of the same family are already in the public service under the civil-service act.

Congress probably intended that all questions in regard to eligibility under the civil-service law should be decided by the Commission.

DEPARTMENT OF JUSTICE,
May 25, 1907.

SIR: I have the honor to acknowledge receipt of your letter of May 22, requesting me to answer the query contained in the letter of the Civil Service Commission, addressed to you under date of May 20, in regard to the effect of section 9 of the civil-service act. (22 Stat., 406.)

This section reads as follows:

"That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any of said grades."

In an opinion dated June 12, 1883 (17 Op., 554), Attorney-General Brewster held that the Commission could not refuse to examine a person otherwise qualified on the ground that there was already a member of the family of such applicant in the public service. In passing upon this question the following language was used:

"The disability in question is a fluctuating one, material only as regards 'appointment.' The state of things which creates it may exist at examination and disappear before appointment, or, vice versa, be nonexistent at examination and yet have arisen at appointment."

With so much of the opinion as passes upon the point necessary to the determination of the question under dis-

The proper definition of the word "whisky," for this purpose, is a question of law, and the term is to be given its ordinary significance as a word of everyday speech, and should not be understood in any commercial or scientific sense.

DEPARTMENT OF JUSTICE,
May 29, 1907.

SIR: In accordance with your instructions, I gave a hearing on Wednesday, May 15, to persons desiring to submit to the Department criticism or other comment on my opinion of April 10 last past as to the construction of section 8 of the act approved June 30, 1906, and generally known as the pure-food law. About thirty persons appeared on this occasion and a number of oral arguments were presented, some critical and some approbatory of the opinion in question. At the conclusion of this argument I announced my willingness to receive and consider any matters in writing which might be submitted to me touching its subject-matter, and, in response to several requests for a further hearing, stated that I would give these requests due consideration and announce later whether I saw any sufficient reason to comply with them. As heretofore stated to you verbally, I do not think any useful purpose would be served by another oral argument, and, with your approval, I have therefore announced that in this respect the matter must be considered closed. I received a large number of written communications from various persons commenting on the opinion in question, and I have carefully considered all of them. I find no reason to withdraw the said opinion or to modify it in any respect, and I respectfully report that, in my judgment, this opinion correctly states the law on the subject to which it relates. As a matter of courtesy, however, to the gentlemen who have favored me with their views, and to remove some misapprehensions which seem to exist respecting the opinion in question, I think it appropriate to further consider in this final report some of the questions discussed at the oral hearing and in the written communications hereinbefore stated.

It seems to be thought by some of the critics of the opinion heretofore rendered that I considered myself bound by

names are reached for certification, their names can not be certified.

This answers the question asked by the Civil Service Commission. I might add that the practical advantages of the rule I have laid down, make it appear likely that Congress intended that all questions in regard to eligibility should be decided by the Commission, which has a complete record of all persons in the service and can, by reference to its own files, easily and expeditiously decide any question of this kind.

The appointing officer, on the other hand, has no satisfactory method of determining whether a person certified has or has not near relatives in the service.

Respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

PURE-FOOD LAW—WHISKY—ETHYL ALCOHOL—BLEND.

Opinion of April 10, 1907 (*ante*, p. 216), as to the construction of section 8 of the act of June 10, 1906 (34 Stat., 768), known as the pure-food law, reconsidered and reaffirmed.

The primary aim of this law was to secure an accurate and serviceable nomenclature for articles of food, and its construction is, therefore, governed by rules in some respects different from those applicable to statutes passed wholly for different purposes, as, for example, laws imposing duties on imports.

Congress must be presumed to have legislated with reference to well-established processes in the manufacture and sale of distilled spirits, and according to such practice, "straight" whisky was mixed only with two substances besides mere coloring and flavoring materials, namely, with "straight" whisky of another kind and with ethyl alcohol.

The evident intent of the statute was to confine the use of the word "blend" to one kind of mixture and to forbid its use for another; and since such mixture must be either composed of two different kinds of whisky, or of whisky with one other substance generally mixed with it, namely, ethyl alcohol, it is clear that Congress intended to deny the designation "blend" to a mixture of whisky and ethyl alcohol.

Ethyl alcohol can not, for the purposes of the pure-food law, be considered to be a "like substance" to whisky.

The proper definition of the word "whisky," for this purpose, is a question of law, and the term is to be given its ordinary significance as a word of everyday speech, and should not be understood in any commercial or scientific sense.

DEPARTMENT OF JUSTICE,
May 29, 1907.

SIR: In accordance with your instructions, I gave a hearing on Wednesday, May 15, to persons desiring to submit to the Department criticism or other comment on my opinion of April 10 last past as to the construction of section 8 of the act approved June 30, 1906, and generally known as the pure-food law. About thirty persons appeared on this occasion and a number of oral arguments were presented, some critical and some approbatory of the opinion in question. At the conclusion of this argument I announced my willingness to receive and consider any matters in writing which might be submitted to me touching its subject-matter, and, in response to several requests for a further hearing, stated that I would give these requests due consideration and announce later whether I saw any sufficient reason to comply with them. As heretofore stated to you verbally, I do not think any useful purpose would be served by another oral argument, and, with your approval, I have therefore announced that in this respect the matter must be considered closed. I received a large number of written communications from various persons commenting on the opinion in question, and I have carefully considered all of them. I find no reason to withdraw the said opinion or to modify it in any respect, and I respectfully report that, in my judgment, this opinion correctly states the law on the subject to which it relates. As a matter of courtesy, however, to the gentlemen who have favored me with their views, and to remove some misapprehensions which seem to exist respecting the opinion in question, I think it appropriate to further consider in this final report some of the questions discussed at the oral hearing and in the written communications hereinbefore stated.

It seems to be thought by some of the critics of the opinion heretofore rendered that I considered myself bound by

the definition of "whisky" adopted by the Department of Agriculture and contained in the papers heretofore submitted to me, and therefore that the correctness of the opinion, in so far as this depended upon an accurate definition of the word in question, would be successfully impeached by showing an error on the part of the said Department in its said definition. This view misapprehends the purport of the opinion. In point of fact, while stating, in substance, that I held the definition in question to be accurate for all purposes directly material to the subject under discussion, I yet ventured to respectfully question its entire accuracy, because, in the words of my opinion, it was not "quite broad enough to meet the general intent of the law of 1906." Of course, if the proper definition of "whisky" were a question of fact, this Department would be bound by the statements on the subject contained in the papers submitted to it when instructed to furnish an opinion; but I do not consider this a question of fact. When words are used in a technical or conventional sense, their proper definition must be established by evidence and found by a tribunal appropriate to pass upon questions of fact; but when the words are used in their ordinary meaning, then, in the words of Mr. Justice Gray in *Nix* v. *Hedden* (149 U. S., 306), "of that meaning the court is bound to take judicial notice as it does in regard to all words in our own tongue, and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court;" that is to say, in the language of the Chief Justice in *Sonn* v. *Magone* (159 U. S., 421), "the interpretation of words of common speech is within the judicial knowledge, *and matter of law.*" In the first of these two cases the Supreme Court held it to be a question of law whether tomatoes were fruits or vegetables; in the second, whether dried lentils and white beans were vegetables or seeds; as it had previously determined in *Marvel* v. *Merritt* (116 U. S., 11) that iron ore was a mineral substance. I think, therefore, the proper definition of "whisky" for the purposes of the pure-food law is a question of law, it being, to my mind, quite clear that for

these purposes the term is to be given its ordinary significance as a word of everyday speech, and is not to be understood in any commercial or scientific sense, as it might be by a distiller or rectifier, a chemist or a physician. For the purposes of my opinion, I had to determine its proper definition just as in *Eureka Vinegar Company* v. *Gazette Printing Company* (35 Fed., 570) the court had to determine the definition of "cider," and as in *U. S.* v. *Ash* (75 Fed., 652) the court took judicial cognizance of what was "whisky" and even of what was a "whisky cocktail."

In establishing the meaning of "like substances," as used in the pure-food law, to determine whether a mixture shall be properly called a "blend" or a "compound," I was able to find no judicial authority which appeared to me sufficiently in point to make its citation appropriate. The essential meaning of "like," as here used, is evidently "of the same class," and on what this class includes must depend the purpose of the classification, or, in other words, the ends of the law. The primary aim of the pure-food law, as explained in my previous opinion, is, in my judgment, to secure an accurate and serviceable nomenclature for articles of food, and its construction is therefore governed by rules in some respects different from those applicable to statutes passed for wholly different purposes, as, for example, laws imposing duties on imports; therefore, although my attention had been called, even before the hearing on May 15, to certain decisions of the Supreme Court construing the phrase "of similar description," which may be assumed *argumenti gratia* to be synonymous with "like," I did not consider it necessary in that opinion to cite or discuss these decisions. It may be, however, well for me to here point out that if they are to be regarded as authorities relevant to the question considered in this connection in the previous opinion, namely, whether ethyl alcohol and whisky are "like substances," they appear to fully sustain the conclusion therein announced. In *Greenleaf* v. *Goodrich* (101 U. S., 278) and *Schmieder* v. *Barney* (113 U. S., 646) the Supreme Court held that the similarity required by this designation is "a similarity in re-

spect to the product and its adaptation to uses and to its uses, and not merely to the process by which it was produced," and that the material question to be determined in each case would be whether "the goods were or not substantially the same or substantially different." Now I think it is quite clear that, while there may be a similarity in the processes whereby whisky and ethyl alcohol, respectively, are produced from grain mash, alcohol and whisky are not, according to the common understanding of the general public, similar in their respective adaptation to uses and their respective uses in fact. I believe that according to the first thought of an ordinarily intelligent and well-informed man whisky is adapted for use, and is used, as a beverage, and alcohol is adapted for use, and used, in medicine or in the arts, and I am satisfied that such a man, if asked the question, would, in a great majority of instances, reply without hesitation that alcohol and whisky were substantially different and not substantially the same things.

It was developed at the hearing before me that some, at least, of the dealers in whisky who questioned the correctness of my opinion claimed that ethyl alcohol and whisky are not merely "like," but identical; that whisky is ethyl alcohol and ethyl alcohol is whisky. Their argument was, in substance, that ethyl alcohol was whisky from which certain congeneric substances, termed by them "impurities," had been removed; and whisky was ethyl alcohol in which these "impurities" had been allowed to remain, or to which some substitute for them had been added. Now it is obvious that "impurities" is a question-begging term, and, if it be admitted that substances so designated are really congeneric with the whisky it is an illogical and therefore an inappropriate designation. Pearls in an oyster may be the result of disease or injury to the animal, but when we speak of "pearl-bearing oysters" they constitute a very important portion of the idea thus expressed. If the so-called "impurities" are an essential part of whisky, or, in other words, if, in the language of the definition of the Department of Agriculture, they "give character to the dis-

tillate," then it is as inaccurate to describe a substance destitute of them as "purified" or "rectified" whisky as it would be to speak of sugar and water as "lemonade without lemons."

To show how the Congress intended the pure-food law, and especially the provision as to "like substances," "blends," and "compounds," to be construed, my attention has been called to remarks of speakers in debate on the bill and to proceedings before committees of one or the other House of Congress. In the language of Mr. Justice Peckham, in *U. S.* v. *Trans-Missouri Freight Association* (166 U. S., 318), "there is * * * a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. * * * The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other, the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed." Thus construed, there would seem to be little difficulty in determining the purpose of the Congress in restricting the use of the word "blend" to a mixture of "like substances," supposing, of course, that this provision was inserted with a view *inter alia* to the labeling or branding of whisky. The Congress must be presumed to have legislated with reference to well-established processes in the manufacture and sale of distilled spirits. There can be no doubt that, according to such practice, "straight" whisky was mixed only with two substances besides mere coloring and flavoring materials, namely, with "straight" whisky of another kind and with ethyl alcohol. There is an evident intent on the face of the statute to confine the use of the word "blend" to one kind of mixture and to forbid its use for another kind of a mixture: and since the Congress must be

supposed to have legislated with regard to existing facts, and, consequently, since the mixture to which it intended to deny the designation "blend" must be either a mixture of two different kinds of whisky or a mixture of whisky with the one other substance generally mixed with it—namely, ethyl alcohol—it follows that, unless we are prepared to say that ethyl alcohol is more "like" to whisky than one whisky is to another, it is reasonable to conclude that the Congress intended to deny the designation "blend" to a mixture of whisky and ethyl alcohol. If this provision was, in fact, inserted with some reference to whiskies (which seems to be generally assumed as a fact by both sides to this controversy), then it is impossible to see why the provision as to blends and compounds was inserted at all, if the Congress considered whisky and ethyl alcohol to be "like substances." So far as I am informed, no combination of whisky with another substance was manufactured and sold, either as a "blend" or otherwise, when the pure-food law was enacted, to which the designation "blend" could be denied, or which could be properly labeled a "compound," if the Congress held ethyl alcohol to be a "like substance" to whisky. I have found, therefore, no difficulty in concluding that, according to all the well-established canons of statutory construction, these two kinds of spirits are not to be considered "like substances" for the purposes of the pure-food law.

Of course, if the Congress thinks they should be, effect can be readily given to the legislative will by an amendment of the law. However, having given a very patient and careful consideration to the entire subject, I respectfully advise you that, as above stated, the opinion already rendered must stand as that of this Department; and I suggest that parties whose interests may suffer from the administration of the law as thus determined take, as soon as may be practicable, appropriate measures to obtain a judicial determination of the questions involved.

I remain, sir, yours respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

THE SECRETARY OF AGRICULTURE—EMPLOYMENT OF GEOLOGISTS.

The Secretary of Agriculture is not authorized to pay the expenses of geologists employed by the Geological Survey of the Department of the Interior to examine mining claims in forest reserves out of the appropriation "General expenses, Forest Service, * * * to protect, administer, improve, and extend the national forest reserves" (act of June 30, 1906, 34 Stat., 683), or the appropriation raised by section 5 of the act of February 1, 1905 (33 Stat., 628), for the "protection, administration, improvement, and extension of the Federal forest reserves," where such employment is for the purpose of securing the cancellation of those claims and the geologists are to be wholly under the control of and paid by the Department of the Interior.

The Secretary of Agriculture has, however, the right to make any investigations necessary or appropriate to the proper discharge of his duties "to protect, administer, improve, and extend the national forest reserves," and for these purposes the ascertainment of the geological conditions of the soil in certain parts of these reserves may be obviously relevant and the employment of the geologists above referred to clearly within his authority.

Information thus obtained may be placed at the disposition of the Department of the Interior and used for any purpose appropriate to the duties of that Department.

DEPARTMENT OF JUSTICE,
June 10, 1907.

SIR: In accordance with your instructions, I have examined the two decisions of the Comptroller of the Treasury bearing date May 2 and May 27, 1907, respectively, and the several communications from the Departments of the Interior and of Agriculture accompanying the same, and submit my opinion respecting the question of law therein discussed. This question is thus stated in the Memorandum of the Law Officer of the Forest Service to the Comptroller requesting a reconsideration of the former of these decisions:

"May the Secretary of Agriculture, out of the appropriation 'General expenses, Forest Service, * * * to protect, administer, improve, and extend the national forest reserves' (act of June 30, 1906, 34 Stat., 683), or the appropriation raised by section 5 of the act of February 1, 1905 (33 Stat., 628), for the 'protection, administration,

improvement, and extension of the Federal forest reserves," pay the expenses of geologists employed by the Geological Survey of the Department of the Interior to examine mining claims in forest reserves *with a view to securing the cancellation of such claims, such geologists to be wholly under the control of and paid by the Department of the Interior?*"

The italics in this citation are my own.

There can be, I think, no doubt that, under ordinary circumstances, a specific appropriation for a purpose particularly designated is so far exclusive that it prohibits the expenditure for that particular purpose of money covered by a general appropriation which might be otherwise available for the said purpose. This view accords with the spirit and intent of section 3678, Revised Statutes, cited by the Comptroller in his second decision, and which is in the words following:

"All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

In this case the Secretary of the Interior has a specific appropriation of $250,000—

"to meet the expenses of protecting timber on the public lands and for the more efficient execution of the law and rules relating to the cutting thereof; of protecting public lands from illegal and fraudulent entry or appropriation; and of adjusting claims for swamp lands and indemnity for swamp lands."

Moreover, the "transfer act," approved February 1, 1905 (33 Stat., 628, sec. 1), provides that—

"The Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled 'An act to repeal the timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved,

excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands."

The passage which I have italicized in this quotation indicates very clearly an intention on the part of the Congress that the Department of the Interior and not the Department of Agriculture should administer the laws relating to the cancellation of fraudulent or irregular claims to public lands within the forest reserves, and, taken in connection with the other provisions of law above cited, it shows, in my opinion, *as the question is stated* in the "Memorandum" first quoted, that the said question must be answered, as the Comptroller has answered it, in the negative.

I think, however, that this answer is required or even justified only by so much of the said question as I have put in italics. Were these words omitted and the question put as follows:

"May the Secretary of Agriculture, out of the appropriation 'General expenses, Forest Service, * * * to protect, administer, improve, and extend the national forest reserves' (act of June 30, 1906, 34 Stat., 683), or the appropriation raised by section 5 of the act of February 1, 1905 (33 Stat., 628), for the 'protection, administration, improvement, and extension of the Federal forest reserves,' pay the expenses of geologists employed by the Geological Survey of the Department of the Interior to examine mining claims in forest reserves?"

I should have no difficulty in answering it "yes." Not only has the Secretary of Agriculture very clearly the right to make any investigations necessary or appropriate to the proper discharge of his duties "to protect, administer, improve, and extend the national forest reserves," and for these purposes the ascertainment of the geological conditions of the soil in certain parts of these reserves may be obviously relevant, but, as noted by the law officer of the Forest Service in his letter to the Comptroller of May 18, 1907, the appropriation acts approved June 30, 1906 (34 Stat., 684), and March 4, 1907 (ibid., 1269), expressly authorize the expenditure of this appropriation "to ascer-

tain the natural conditions of * * * the national forests." Neither the Comptroller nor the Attorney-General is in any wise concerned with the use which the Secretary of Agriculture may propose to make of the information thus acquired; the information itself being relevant to the discharge of his duties under the law, it must be presumed that it is acquired for use in connection with the duties aforesaid, in the absence of an official statement that it is acquired for other purposes. The fact that some one may have attempted to locate a mining claim on the part of the forests so investigated can not affect the right of the Secretary of Agriculture to make the investigation; nor is it material that this fact may have suggested to the Secretary the advisability of having the "natural conditions" of the particular tract investigated.

Of course, when any information has been thus obtained by the Department of Agriculture the President can place it at the disposition of the Department of the Interior (or any other Department) to be used for any purpose appropriate to the duties of the last-mentioned Department, and, no less obviously, the geologists or other persons employed by the Department of Agriculture to obtain this information may be required to testify or otherwise cooperate in any proceedings undertaken by the Department of the Interior to secure the cancellation of fraudulent or irregular claims.

Very respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

NUMBER OF PASSENGERS ALLOWED ON STEAMBOATS—ENFORCEMENT OF THE LAW.

The duty of enforcing the law limiting the number of passengers a steamer may carry rests equally on officers of the customs and on steamboat inspectors under section 4496, Revised Statutes; and the Secretary of Commerce and Labor, the Steamboat-Inspection Service having been transferred from the Treasury Department to his Department, has the authority to appoint additional inspectors at certain ports and to assign them to the duty in question, but he is not authorized to assume entire control of the enforcement of this provision of the law.

The "inspectors aforesaid," referred to in section 30 of the act of February 28, 1871 (16 Stat., 440), from which section 4496, Revised Statutes, is taken, were local inspectors of steam vessels, and therefore the words "all inspectors," in section 4496, refer to such inspectors, being the only ones included in Title LII of the Revised Statutes, and not to inspectors of customs.

DEPARTMENT OF JUSTICE,
June 12, 1907.

SIR: Your letter of May 28 inquires whether the enforcement of the limitations of the law as to the number of passengers which a steamer may carry is a duty which should be performed by the Secretary of Commerce and Labor, through the agents of that Department, or by the Secretary of the Treasury, through the agency of the inspectors of customs.

Title LII, Revised Statutes, "For the Regulation of Steam Vessels," is divided into two chapters, the first of which deals with the inspection of vessels and the second with the transportation of passengers and merchandise.

The appointment of a supervising inspector-general is provided for by section 4402, to superintend the administration of the steamboat-inspection laws. Section 4404 provides for the appointment of 10 supervising inspectors to supervise local boards of inspectors. Section 4414, as amended by acts of 1887, 1890, 1895, 1897, 1898, 1900 (vol. 3, U. S. Comp. Stat., p. 3020), provides for an inspector of hulls and an inspector of boilers at each of certain enumerated collection districts, and also for assistant inspectors, to be appointed by the Secretary of the Treasury in collection districts where there are 225 steamers and upward to be inspected annually. The duties of such inspectors are prescribed by succeeding sections: they relate mainly to the inspection of hulls, machinery, and safety appliances. In addition, however, these inspectors are required by section 4450 to "investigate all acts of incompetency or misconduct committed by any licensed officer while acting under the authority of his license;" and for this purpose the inspectors may summon and compel the attendance of witnesses, and if they are satisfied that such licensed officer is incompetent or has been guilty of misconduct, etc., or has willfully "violated *any provision of this title*,

they shall immediately suspend or revoke his license." Since the provisions of this title relate not only to the inspection of the vessels themselves, but to the transportation of passengers (ch. 2), it is the duty of inspectors to investigate as well violations of the provisions limiting the number of passengers to be carried (secs. 4464, 4465).

Section 4464 requires the inspectors to state in every certificate of inspection granted to passenger steamers the number of passengers that may be carried with prudence and safety, and section 4465 makes it unlawful to take on board a greater number of passengers than is stated in such certificate, and imposes a penalty for violation of the provision. Special permits may be issued by the inspectors to excursion steamers, stating the additional number of passengers that may be carried, etc. (Sec. 4466.) Section 4496 provides:

"All collectors, or other chief officers of the customs, and all inspectors within the several districts shall enforce the provisions of this title against all steamers arriving and departing."

And by section 4497 "every collector, or other chief officer of the customs, or inspector," who omits any duty under the preceding section is liable to removal from office and to a penalty.

It seems beyond question that the "inspectors" referred to in sections 4496 and 4497 are the local inspectors so frequently mentioned throughout the entire title as belonging to the Steamboat-Inspection Service. Customs inspectors are not referred to in any of the sections, and the wording and punctuation of sections 4496 and 4497 would seem to make it perfectly clear what inspectors are meant. It might be suggested that because the words "all inspectors" are used in section 4496, customs inspectors are intended to be included thereby, but it is much more likely that steamboat inspectors only are meant, while customs inspectors would be included in fact in the opening phrases of the section, because a collector or other chief officer of customs proceeding to enforce the law under section 4496 would necessarily perform the particular duty here in question by subordinates, namely, customs inspectors.

Further, an examination of the original act from which Title LII of the Revised Statutes was drawn, together with prior acts relating to the same subject, shows conclusively that the inspectors referred to in section 4496 are *steamboat* inspectors and not inspectors of customs. (Sec. 30, act of Feb. 28, 1871, 16 Stat., 440; secs. 9, 24, act of Aug. 30, 1852, 10 Stat., 61; sec. 3, act of July 7, 1838, 5 Stat. 304.) By these acts provision was made for steamboat inspectors, referred to throughout the legislation as inspectors and local inspectors, who were constantly appropriated for as "local inspectors of steam vessels" (e. g., appropriation acts of July 15, 1870, March 3, 1871, 16 Stat., 292, 496, 516).

The act of February 28, 1871 (*supra*), from which section 4496 is taken, provides (sec. 30):

"That it shall be the duty of the collectors or other chief officers of the customs and of the inspectors *aforesaid* within the said several districts, to enforce the provisions of law against all steamers arriving and departing, etc."

In my opinion, there can be no doubt, upon consideration of the entire series of acts, that the "inspectors aforesaid" were the local inspectors of steam vessels, and, therefore, that the phrase "all inspectors," in section 4496, refers to such inspectors, being the only ones included within that title of the Revised Statutes, and not to inspectors of customs.

It seems especially appropriate that the inspectors who are charged with the duty of issuing certificates of inspection to passenger steamers, stating the number of passengers that may be carried with prudence and safety (sec. 4464), shall also be charged with the duty of seeing that the requirements of the law are complied with.

The duty, then, of enforcing the law limiting the number of passengers a steamer may carry appears to rest equally on officers of the customs and steamboat inspectors under section 4496; and the Secretary of Commerce and Labor, the steamboat-inspection service having been transferred from the Treasury Department to his Department, has the authority to appoint additional inspectors at certain ports and to assign them to the duty in question. (Sec. 4414,

Revised Statutes, as amended, vol. 3, U. S. Comp. Stat., 3020, 3021; act of Feb. 14, 1903, establishing the Department of Commerce and Labor, sec. 10, 32 Stat., 825, 829.)

The Secretary of Commerce and Labor states that he is advised that "hitherto officers of the customs have been regarded as primarily responsible for the observation of those requirements which are enforced by the levy of fines, although officers of the Steamboat-Inspection Service have very generally cooperated with them and have borne a share of the work of counting passengers," but that the law could be more efficiently enforced if the responsibility were not divided, and he suggests that the Department of Commerce and Labor take over the task altogether. This, however, is not authorized as the law now stands, the duty of enforcing the provisions in question, as has been seen, resting upon customs authorities as well as upon steamboat inspectors and not belonging exclusively to either.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

SURETY COMPANIES—STATUTORY REQUIREMENTS—VALIDITY OF BOND.

The validity of a bond executed jointly and severally by the American Surety Company, of New York, and the People's Trust Company, of Lancaster, Pa., guaranteeing the faithful performance of the duties of a pay officer of the Navy, is not impaired by the fact that the latter company has not obtained the written authority of the Attorney-General to do business, as required by the act of August 13, 1894 (28 Stat., 279).

The People's Trust Company, having exercised the powers conferred by its charter and received the benefit arising therefrom, can not discharge itself from the duties imposed by the above-named act, notwithstanding the company has not complied with certain statutory requirements to which the State alone can object.

DEPARTMENT OF JUSTICE,

June 14, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of the 1st instant relating to a bond executed jointly

and severally by the American Surety Company, of New York, and the People's Trust Company, of Lancaster, Pa., guaranteeing, in the full amount thereof, the faithful performance of the duties of a pay officer of the United States Navy. The bond has been approved by you. I assume that the People's Trust Company had the requisite corporate power.

You desire my opinion as to whether the validity of the bond or the obligation of either of the sureties is impaired by the fact that one of them is not authorized by the Attorney-General to act as surety in United States matters.

The act of Congress of August 13, 1894 (28 Stat., 279), provides that any company having the necessary corporate power and a capital stock of not less than $250,000 in cash, or its equivalent, may execute as *sole* surety any bond required or permitted by the laws of the United States to be executed with one surety or with two or more sureties; and requires that, before being in a position to act as surety, the company shall have from the Attorney-General authority in writing to do such business.

The American Surety Company has complied with the provisions of the law and is authorized to execute the bond as sole surety. The People's Trust Company has no such authority. The doubt suggested by your letter is whether, in the absence of authority upon the part of the People's Trust Company, its contract of insurance, whether executed jointly or severally, is invalid or renders invalid the entire contract executed by both sureties.

Although the People's Trust Company has not complied with the statutory requirements, yet, inasmuch as it has exercised the powers conferred by its charter and received the benefits arising therefrom, the duties imposed upon it by the act will attach, from which it can not discharge itself. This position is fully sustained by the authorities. Beach on Private Corporations, 24; *Abbott* v. *Aspinwall*, 26 Barbour (N. Y.), 206; *Dooley* v. *Cheshire Glass Co.*, 15 Gray (Mass.), 495; *Merrick* v. *Reynolds Co.*, 101 Mass., 384; *Hawes* v. *Anglo-Saxon Co.*, 101 Mass., 394; *Whitney* v. *Wyman*, 101 U. S., 392, and cases cited.

In the *Whitney* v. *Wyman* case the defense was made that at the date of the letters ordering the machinery the corporation was forbidden to do business, not having filed its articles of association, as required by statute. To this defense the Supreme Court held that the "corporation having assumed by entering into the contract with the plaintiff to have the requisite power, both parties are estopped to deny it. * * * The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void nor was any penalty prescribed. No one but the State could object. The contract is valid as to the plaintiff, and he has no right to raise the question of its invalidity."

In reply, then, to your inquiry, I have the honor to say that, in my opinion, the validity of the bond or the obligation of either of the sureties is not impaired by the fact that one of them has not the written authority required by the act of Congress of August 13, 1894.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE NAVY.

EIGHT-HOUR LAW—JETTY WORK, COLUMBIA RIVER.

The act of August 1, 1892 (27 Stat., 340), known as the eight-hour law, applies to the jetty work at the mouth of the Columbia River, which is being conducted directly by the Government, and those employed upon that work who come fairly within the meaning of the words "laborers and mechanics" should be restricted to eight hours of effective labor in any one calendar day, irrespective of enforced idleness on other days, except in case of a sudden emergency requiring prompt action.

The exception, in section 1 of that act, of cases of extraordinary emergency, was designed to excuse overtime work which must be rendered to avert some sudden unusual emergency, unexpectedly arising and calling for prompt action.

DEPARTMENT OF JUSTICE,
June 17, 1907.

SIR: I have the honor to respond to your note of June 10, 1907, in which you refer to me a letter from Lieutenant-

Colonel Roessler, Corps of Engineers, with a request for my opinion as to the applicability of the eight-hour law, so called (27 Stat., 340), to the jetty work at the mouth of the Columbia River, which is being conducted directly by the Government.

The facts are stated as follows: The jetty, when completed, will consist of a pile trestle 6½ miles in length, with an enrockment of rubblestone superimposed. About 5 miles of the jetty have been constructed, and the work is now centered upon the outer 2 miles of this portion, which "is exposed to the full force of the breakers which have made the bar of the Columbia River a terror to all navigators. The seas are never smooth and often rough, even during the summer season, rendering the operation of constructing the pile trestle and conveying rock over it a matter of considerable risk to life and property." The work seems to be steadily progressing, but it is liable to frequent interruptions. Sometimes there is no interruption for two or three days, and again all work, except small jobs on shore, must be suspended for periods varying from a few hours to several days. The delays are occasioned partly by fogs, which prevent the barges bearing the stone from reaching their destination as soon as required, and partly because of vibrations imparted to the trestle by the action of the waves, which stop, for varying periods, the work of the pile driver and the carriage of the stone. On account of these natural causes, hindering the speedy completion of the jetty, it seems that laborers and mechanics are worked over eight hours a day when conditions are favorable. The question of preventing this overtime work has been considered by the officer in charge of the construction, but he believes that the employment of an extra gang of men is not practicable. The impracticability of employing an extra shift, however, does not arise from any difficulty inherent in the project. It is based almost entirely on economical considerations of speedy and cheap methods. He says:

"The question of providing an extra gang of men has had careful consideration, but it is believed to be wholly impracticable. If an extra gang were employed, the two gangs would have probably not over five hours per day, on

an average, a month during the working season, and many days at a time at least one gang would be in idleness * * *. Even if the employment of two gangs were feasible from other reasons, it would still be very objectionable from the delays that would result in changing from one gang to another, such changes being likely to come at a time when the interruption would mean the loss of a valuable opportunity. It is estimated that the labor item alone would be increased from 60 to 80 per cent if it should become necessary to employ two gangs of laborers."

Upon consideration of all the facts, it fairly appears, in my opinion, that the difficulties of construction are such as were known and fully appreciated at the time of the preliminary survey. They are not so grave as to compel the conviction that Congress never could have intended the statute to apply to such work. In the cases of *Eastern Dredging Company* v. *The United States* and *Bay State Dredging Company* v. *The United States* (206 U. S., 246), the Supreme Court, in holding that dredging an artificial channel is not one of the "public works" intended by Congress, assigned as one of its reasons "the very great difficulty, if not impossibility, of dredging in the ocean, if such a law is to govern it * * *." Here, however, it appears to me that the difficulty results at most merely in an inconvenience, and, as was pointed out in the dissenting opinion in those cases, that "is a consideration fit to be addressed to Congress" rather than to the courts or administrative officers. The work belongs to the United States and is a complete whole, having structural unity and a permanent existence, and is within the rule laid down in those cases.

Nor does it seem to me that the facts show a case of extraordinary emergency within the exception to the law contained in its first section, "in case of extraordinary emergency." That exception was not intended to have a wide but a narrow operation, and was mainly designed to excuse overtime work which must be rendered to avert some sudden, unusual exigency quickly and unexpectedly arising and calling for prompt action. In *Ellis* v. *The United States* (206 U. S., 246, 257), it was said:

"It needs no argument to show that the disappointment of a contractor with regard to obtaining some of his materials, a matter which he knew involved some difficulty of which he took the risk, does not create such an emergency as is contemplated in the exception to the law."

In the lower court the judge had instructed the jury:

"* * * an extraordinary emergency * * * is the sudden, unexpected happening of something not of the usual, customary, or regular kind, demanding prompt action to avert imminent danger to life, limb, health, or property. The possibility of danger is not enough."

This ruling, indirectly approved by the Supreme Court, was adopted in the case of *The United States* v. *The Sheridan Kirk Contract Company* (149 Fed Rep., 809, 813); by Attorney-General Moody, now Mr. Justice Moody, in a circular letter dated October 31, 1906, and by your Department in two circulars.

In Circular No. 33, under date of July 30, 1906, it was said:

"Attention is called to the fact that the emergency provision in the law is considered to cover any extraordinary emergencies which can not be foreseen, such as might be necessary for saving life or property of the United States, *and not cases which depend for their emergency solely upon economical methods of work or importance of rapid construction.*"

Again, in Circular No. 62, under date of December 26, 1906, it was said:

"An 'extraordinary emergency' under the act is one not to be foreseen in time to avoid the necessity of exceeding the limit of the fixed daily hours of labor by the employment of more men or more shifts of men. *More economical considerations do not affect the question at all. It is to be assumed that in making the requirement Congress knew that under many conditions the law would impose great expense upon the Government.*"

Although there can be no doubt that in the prosecution of this work in this dangerous locality extraordinary emergencies within the exception to the law have arisen and will arise, still, upon the facts stated, I am of opinion that no

case of continuing extraordinary emergency exists, and, therefore, upon the questions suggested by your communication you are advised that the eight-hour law applies to this work, and that I fully concur with the view of your Department, as expressed in the circulars quoted above, that those who fairly come within the ordinary meaning of the words "laborers and mechanics" should be restricted to no more than eight hours of effective labor upon each calendar day, irrespective of enforced idleness on other days, except when a sudden emergency must be met by prompt action.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

COMPROMISE—VIOLATION OF THE OLEOMARGARINE LAW.

The officers of the Treasury Department are authorized, in accordance with the provisions of section 3229, Revised Statutes, to compromise a case involving a violation of the "Oleomargarine" statutes, upon terms which, in their judgment, are just and reasonable.

DEPARTMENT OF JUSTICE,
June 18, 1907.

SIR: I have the honor to acknowledge receipt of your letter of May 10, inclosing an opinion of the Solicitor of Internal Revenue, and requesting my opinion upon two questions:

First. Whether under section 3229 of the Revised Statutes, the Secretary of the Treasury is authorized to compromise a case involving a violation of the provisions of the "Oleomargarine" statutes, where an offer of compromise had been made.

Second. Whether the Secretary of the Treasury would have power to accept a compromise after the assessment was made, the taxpayer being solvent.

Under the facts as stated to me it is unnecessary for me to express an opinion as to the individual merits of the case. That matter is primarily within the province of the Commissioner.

Section 3229, Revised Statutes, is broad and general in its terms. It provides for the compromise of both criminal and civil cases. Its provisions extend to cases both before and after suits commenced. While in the one case the action of the Commissioner must be with the advice and consent of the Secretary of the Treasury, and in the other with the advice and consent of the Secretary and the recommendation of the Attorney-General, the intention of the Legislature evidently was to place the authority and responsibility primarily with the Commissioner.

This section may be, and has been, considered in connection with section 3469, Revised Statutes. By that section, upon a report of a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the case may be compromised and recommending that it be compromised upon the terms so offered, and upon the recommendation of the Solicitor of the Treasury, the Secretary is authorized to compromise the claim. The only restriction is as to claims arising under the postal laws.

It is clear that section 3229 (supra), which is restricted to cases under the internal-revenue laws, is much broader in its language than section 3469. The initiative of action is with the Commissioner. It is unnecessary to say that he is obliged to proceed with regard to the facts in the case as to neglect or violation of law by the persons reported to him. The statute provides that when the compromise is made there shall be placed on file in the office of the Commissioner, the opinion of the Solicitor of Internal Revenue, with his reasons therefor, with the statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the persons against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise.

This matter was carefully considered by my predecessor, Attorney-General MacVeagh (17 Op., 213), in an opinion upon the general power of the Secretary in cases submitted

to him for compromise. I refer you to his reasoning and to the conclusion he there reached.

I reply, then, that the officers of the Department of the Treasury, in accordance with the provisions of section 3229 (supra), are fully authorized to make the compromise alluded to upon terms which, in their judgment, are just and reasonable.

In view of the facts presented to me, no assessment having been made, I do not deem it advisable or necessary to further answer the second question addressed to me.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF COMMERCE AND LABOR.

IMMIGRATION—CONTRACT LABOR.

Two alien lithographic artists, who came to the United States in pursuance of a contract of employment entered into with the American Lithographic Company, of New York, their passage being prepaid by that company, and who have been excluded upon the ground that their admission would be in violation of the acts of February 26, 1885 (23 Stat., 332), and March 3, 1903 (32 Stat., 1213), relating to contract labor, should be admitted, it being shown beyond reasonable doubt that there are not a sufficient number of lithographic artists in the country at the present time to meet the demands of business.

DEPARTMENT OF JUSTICE,
June 18, 1907.

SIR: I have the honor to acknowledge receipt of your letter of May 23, with inclosures, in which my attention is invited to the case of two aliens detained at New York, who have been excluded from the United States by the decision of a board of special inquiry on the ground that their admission would be a violation of the provisions of the acts of February 26, 1885 (23 Stat., 332), and March 3, 1903 (32 Stat., 1213), relating to contract labor. From this decision of the board an appeal has been taken to you, and my opinion is asked as to what your decision should be.

It appears from the testimony taken at the hearings held by the board that the aliens in question—August Kurz-

dorfer and John Haering—are lithographic artists and natives of Germany, who are coming to this country in pursuance of a contract of employment entered into by them with the American Lithographic Company, of New York. The company, through an agent abroad, prepaid their passage, and agreed to employ them for a period of one year at a stipulated weekly salary.

Unless saved by an excepting clause or a proviso, this contract is squarely within the prohibition of the statutes referred to. While this is not denied by the appellants, it is insisted in their behalf that, under the first proviso of section 5 of the act of February 26, 1885 (*supra*), and the second and third provisos of section 2 of the act of March 3, 1903 (*supra*), they should be admitted.

The material part of section 5 of the act of 1885 reads as follows:

"* * * *Provided*, That skilled labor for that purpose can not be otherwise obtained; nor shall the provisions of this act apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants: * * *"

Section 2 of the act of 1903 specifies certain classes of persons who shall be excluded; among others, "those who have been, within one year from the date of application for admission to the United States, deported as being under offers, solicitations, promises, or agreements to perform labor or service of some kind therein." This section also contains the following provisos:

"* * * *And provided further*, That skilled labor may be imported if labor of like kind unemployed can not be found in this country: *And provided further*, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants."

Unless, then, it can be shown that these aliens are artists within the meaning of the statutes, or that skilled labor of like kind, unemployed, can not be found in this country, the

appeal must be dismissed. A decision upon either point in favor of the aliens would entitle them to admission.

As the appeal should clearly be sustained on the second ground upon the evidence submitted, I deem it unnecessary to determine whether the appellants are artists.

On the former point the evidence is so free from contradiction that were the case being tried by a judge and jury the court would be obliged to direct a verdict for the aliens. Their counsel, at the hearing before the board of inquiry, called officers of five different lithographic companies to testify to the scarcity of lithographic artists in this country. Henry W. Kupfer, superintendent of the art drawing department of the American Lithographic Company, testified that he had been for four years in charge of that department, and that during all that time part of his duty had been to hire lithographic artists; that while his company could use to advantage twenty or twenty-two artists it had only ten. He further testified that for three or four years there had been the same difficulty in securing men to do this work. It also appears from his testimony that the company, in the belief that to meet this situation it was necessary to bring men in from abroad, applied early in 1907 to your Department to know how this might be done. The Commissioner-General of Immigration suggested that before any steps were taken looking to the importation of labor it was advisable to demonstrate to the satisfaction of the authorities that no labor of like kind, unemployed, was available in this country. In accordance with his suggestions advertisements were inserted three times a week for four weeks in twelve newspapers of general circulation in the eight cities where it seemed most likely that lithographic artists could be secured. There were thirty-two answers to these advertisements. No personal applications were made, and the company did not secure a single lithographic artist as a result of its efforts. The reasons why none of the thirty-two who communicated with the company were selected are clearly and satisfactorily explained in the record you have submitted for my consideration. The company thereupon entered into contract, above referred to, with

Kurzdorfer and Haering, informing the Commissioner-General of Immigration of the fact and of the date upon which the aliens would reach New York in order that a test case might thus be made.

Olin D. Gray, president of the Gray Lithographic Company, testified that he had been for twenty-two years in the business, and that for three or four years past he has been unable to get a sufficient number of lithographic artists, and as a result has been repeatedly forced to decline to take orders requiring a high grade of workmanship. These orders have then been placed abroad. His company has advertised in almost every Eastern paper, and has applied to the National Lithographic Artists, Engravers, and Designers' League, the trades union of the craft, without getting relief. Mr. Gray further testified that he had sent emissaries to different cities in the United States to secure men without getting relief. While he admitted his unwillingness to employ union men, he testified that there were no union men unemployed qualified to do the work he wanted.

J. L. Ketterlinus, president of the Ketterlinus Lithographic Manufacturing Company, testified that he had been unable to secure the number of lithographic artists he needed for five years back.

W. F. Powers, president of the W. F. Powers Lithographic Company, testified that he had been obliged to refuse work because he could not get men.

C. W. Frazier testified to the same effect.

All of these witnesses swore that the demand for high-grade lithographic artists was constantly increasing in this country. The work, however, has been going abroad, because the lack of skilled lithographic artists, according to the statements of these witnesses, prevents its being done in this country.

Counsel for appellants has also put in evidence a report of the Bureau of Statistics, showing that the value of lithographic importations has increased from under $950,000 for the fiscal year ending June 30, 1898, to approximately $2,700,000 for the last fiscal year. This development has been gradual and steady, every year showing an increase

over the year before, and the figures for the first nine months of the current fiscal year show a still further increase.

This testimony as to the scarcity of labor is practically uncontradicted. Counsel for the Lithographic Artists, Engravers, and Designers' League attempted to show that the difficulty in securing men was due to a strike which had been declared in August, 1906. This idea is negatived by the statements of the witnesses above referred to to the effect that the shortage existed for several years prior to the time the strike was declared. Nowhere in the record is there a scintilla of evidence even tending to contradict this.

Richard Kitchett, president of the National Lithographic Artists, Engravers, and Designers' League, testified that there were about two hundred and forty members of his organization unemployed in the United States, and that this was a sufficient number to fill all vacancies and to meet the demands of the lithographic business. Counsel for the aliens then put in evidence a circular issued, with the knowledge of Mr. Kitchett, by the national advisory board of the Lithographic Artists, Engravers, and Designers' League, of which he admitted he was the head, which ran in part as follows: "The employers' own figures show that the number of men they lack in the art department is actually greater than the whole number now out, so that were the strike to be settled to-morrow there would not be enough men to fill all vacancies."

In view of this statement, issued with his authority by a board of which he was the head, his testimony to the contrary is entitled to but little weight.

I therefore advise you that the record you have submitted shows beyond any reasonable doubt that there are not in the country at this time a sufficient number of lithographic artists, employed and unemployed, to meet the demands of the business. The decision of the board of special inquiry should, therefore, be reversed, and the aliens admitted.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF COMMERCE AND LABOR.

JURISDICTION—CONDUIT ROAD, MARYLAND.

The laws of Maryland confer upon the mayor of the town of Glen Echo no authority to impose or collect fines, either for violations of the ordinances of that town or for offenses against the laws of the State of Maryland.

Congress has the right of exclusive jurisdiction over the entire length of the Conduit road, provided the roadbed is owned in fee by the United States and has been acquired in accordance with the consent of the legislature of the State of Maryland contained in the act of May 3, 1853 (Laws of Md., 1853, ch. 179).

The provisions in Article I, section 8, of the Constitution, that Congress shall have power to exercise exclusive legislation in all cases whatsoever over the District of Columbia and "all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and *other needful buildings*," contemplates the purchase of land "needful," for any reason, to the discharge of any of the constitutional duties or the exercise of any of the constitutional powers of the United States.

The reservoirs, aqueducts, and other constructions appurtenant to the water supply of the city of Washington, D. C., are to be considered "needful buildings" within the meaning of Article I, section 8, of the Constitution, and since a roadway is an appropriate and necessary appurtenance to such works, the Conduit road constitutes territory within the exclusive jurisdiction of Congress.

The Conduit road is not a public highway, but is subject to the control of the Chief of Engineers (section 1800, Revised Statutes), and its use by the public may be subjected to such regulations as may be appropriate, obedience to which may be secured by the use of such reasonably sufficient force as the Secretary of War may deem advisable.

DEPARTMENT OF JUSTICE,
July 3, 1907.

SIR: Your letter of June 8, 1907, and accompanying documents were duly received. In these papers reference is made to certain alleged proceedings on the part of the mayor of Glen Echo, a small town in Montgomery County, Md., and you request my opinion "as to the steps necessary to be taken, either by direct intervention or through the courts, to prevent the continuance of the alleged abuses by the mayor, who is imposing fines and collecting them by force without a hearing from the members of the public

using that part of the road which runs through the town of Glen Echo," the road in question being one generally known as the "Conduit road."

In so far as your letter relates to the action of the mayor of Glen Echo, it is material, first, to determine how far, if at all, he has authority to impose and collect fines in accordance with the laws of Maryland. The town of Glen Echo was incorporated by chapter 436 of the Laws of Maryland of the year 1904, approved April 8, 1904. The charter then granted conferred no power specifically upon the corporation to regulate the speed of vehicles, but at the session of 1906 two acts were passed, nearly or quite identical in their terms, constituting, respectively, chapters 560 and 826 of the laws of that year, both being approved April 8, 1906, whereby the above-mentioned act of 1904 was repealed and reenacted with amendments. These laws conferred on the town council of Glen Echo the power *inter alia* "to regulate the speed of all conveyances upon the streets or any public highway or road within the town, such as carriages, bicycles, autocycles, motorcycles, automobiles, locomobiles, and street cars." At the same session another act was passed, being chapter 449 of the laws of that year, with respect to motor vehicles, the material provision of which for the present purpose is as follows:

"The following rates of speed may be maintained, but shall not be exceeded, upon any public street, public road or turnpike, public park or parkway, public driveway or public highway in this State by anyone driving a motor vehicle: (1) A speed of one mile in ten minutes upon the sharp curves of a highway and at the intersection of prominent crossroads, where such road or highway passes through the open country. (2) A speed of one mile in ten minutes where such street or highway passes through the built-up portion of a city, town, or village, except cities of 16,000 inhabitants or over; elsewhere, except as otherwise provided in this sub-title, a speed of one mile in five minutes."

I am informed by the papers sent with your letter that the town council of Glen Echo has adopted an ordinance in the precise terms of the general law of the State above quoted, and that the mayor's action, of which complaint is

made in your letter, has been taken professedly in the enforcement of the above-mentioned ordinance. Of course the authority of the town council of Glen Echo to regulate the speed of vehicles on the Conduit road depends upon whether this road, in so far as contained within the limits of the town of Glen Echo, is a "street," "public highway," or "road" *within the said town;* but supposing, for the sake of argument only, that it is such street, public highway, or road, we have yet to inquire whether the mayor has any power to impose and collect fines for the violation of the above-mentioned ordinance or any ordinance of the town council.

Section 8 of the charter of Glen Echo is as follows:

'*And be it enacted*, That the mayor shall have all the powers of a justice of the peace *in criminal cases where the town of Glen Echo is a party*, and shall receive fees allowed justices of the peace in similar cases, and an appeal from his judgment when the demand or fine exceeds five dollars may be taken to the circuit court for the county, which shall hear and determine the matter as upon appeal from justices of the peace."

It will be perceived that this provision of the statute professes to give to the mayor only such jurisdiction as a justice of the peace would have in *criminal* cases "to which the town of Glen Echo is a party." There are many authorities on the question whether, in the absence of any statute on the subject, proceedings to punish the violation of a municipal ordinance should be undertaken in the name of the municipality or of the State; and, speaking broadly, it may be said that this has been generally held to depend upon whether such proceedings are regarded as civil or criminal in their nature, the weight of authority being, on the whole, that they are civil, and should therefore be prosecuted in the name of the municipality. In Maryland, however, this question has been determined by statute. Article 38, section 1, of the code of public general laws of that State, provides that—

"When any fine or penalty is imposed by any act of assembly of this State or by any ordinance of any incorporated city or town in this State enacted in pursuance of

sufficient authority for the doing of any act forbidden to be done by such act of assembly or ordinance, or for omitting to do any act required to be done by such act of assembly or ordinance, the doing of such act or the omission to do such act shall be deemed a criminal offense; such offense in the city of Baltimore shall be prosecuted by the arrest of the offender for such offense and by holding him to appear in or committing him for trial in the criminal court of Baltimore, which said court shall have jurisdiction in the said case, and shall proceed to try or dispose of the same in the same manner as other criminal cases may be tried or proceeded with or disposed of, or such offense may be prosecuted by indictment in such court; such offense in any county of this State shall be prosecuted by the arrest of the offender for such offense and by holding him to bail to appear in or committing him for trial in the circuit court for the county in which such offense was committed. * * *."

By article 27, section 447, of the same act, it is further provided that indictments for such offenses shall conclude "against the form of the ordinance in such case made and provided and against the peace, government, and dignity of the State." It seems clear that the powers conferred by various statutes of the State of Maryland upon justices of the peace to dispose summarily of certain criminal charges can not affect the character of the proceeding; in my opinion, therefore, in Maryland, proceedings to punish offenders against municipal ordinances are made criminal by express law, and the only appropriate, or indeed possible, "parties" to such proceedings are the State of Maryland and the alleged offender or offenders. It would seem to follow that the mayor of Glen Echo has no jurisdiction to impose fines for the violation of the ordinances of the town council, since to such a proceeding the town of Glen Echo is not a party. Of course, if the proceedings were undertaken under chapter 449 of the laws of 1906 or any other general law of the State, it is quite clear that section 8 of the charter above quoted would give him no jurisdiction whatever in the premises.

There is, moreover, room for a further inquiry in this connection. Article 4, sections 1 and 42, of the constitution of Maryland, contain the following provisions:

"The judicial power of this State shall be vested in a court of appeals, circuit courts, orphans courts, such courts for the city of Baltimore as are hereinafter provided for, and justices of the peace. * * * The governor, by and with the advice and consent of the senate, shall appoint such number of justices of the peace and county commissioners of the several counties, and the mayor and city council of Baltimore, respectively, shall appoint such number of constables, for the several election districts of the counties and wards of the city of Baltimore, as are now or may hereafter be prescribed by law. * * * The justices of the peace and constables, so appointed and commissioned, shall be conservators of the peace, shall hold their office for two years, and shall have jurisdiction, duties, and compensation, subject to such right of appeal, in all cases, from the judgment of justices of the peace as hath been heretofore exercised or shall be hereafter prescribed by law."

In *McBee* v. *Fulton* (47 Md., 425), the court of appeals of Maryland says: "By our constitution justices of the peace are made part of the judiciary in whom the judicial power of the State is vested."

There can be no doubt that the legislature of Maryland intended to confer upon the mayor of Glen Echo a portion of "the judicial power of the State." Beside what is contained in section 8 of the charter above quoted, section 17 provides that—

"The mayor shall have full power to conduct investigations as to violations of any ordinance of said town, hold court at some public place whenever the case requires; issue warrants, summons, and attachments. Said mayor shall have power to punish any person or persons for contempt; shall have power in case of conviction of any offender or violator of a town ordinance to commit said offender to the Montgomery County jail; in default of surety for his appearance for trial or in default of fine and

cost, and in the cases as herein provided, he shall have the power to commit offenders to the Maryland House of Correction or to labor upon the streets."

And section 20 is as follows:

"*And be it enacted*, That the mayor shall keep a criminal docket with index, and shall record all proceedings of cases which come before him for trial."

But can the legislature of Maryland thus confer a part of the judicial power of the State upon an officer who not only is not a justice of the peace as defined by the constitution, but is not chosen in the manner prescribed by the constitution for the choice of justices of the peace?

On this question the decision in *Mayor & City Council of Hagerstown* v. *Dechert* (32 Md., 369) seems to be conclusive. Similar powers had been conferred on the mayor of Hagerstown by a charter antedating the constitution of 1851 (which first contained, in substance, the provisions on this subject of the present constitution), and its language was embodied in the Code of Local Laws of 1860. On this point the Court of Appeals says (32 Md., p. 383):

"It is very clear that, after the adoption of that constitution, the legislature had no power to appoint a justice of the peace, nor could they vest judicial power in any other officer except such as were enumerated in the first section of the fourth article of the constitution. When that constitution was adopted, therefore, it stripped the mayor of the judicial power or jurisdiction appertaining to the office of a justice of the peace, which had been conferred upon him by the act of 1847; and it is equally clear that such jurisdiction could not, constitutionally, be conferred upon him by the Code of 1860."

The case of *Attorney-General* v. *McDonald* (3 Wis., 805) is likewise precisely in point and several other decisions of State courts of last resort might be cited to show that such legislation is clearly unconstitutional.

If the view of the Maryland law above suggested be correct, it follows that the mayor of Glen Echo has no jurisdiction to impose or collect fines, since the provision of the charter professing to give him such jurisdiction is inoperative by its terms, and, if it were operative, would be

unconstitutional. It would seem that persons who have been compelled to pay such fines, when under arrest and threatened with imprisonment, are entitled to recover back the same, either from the mayor himself or from the town of Glen Echo, if the money has been (as I understand to be the case) paid into the municipal treasury. Whether it would be practicable to arrange a satisfactory test case to determine his authority in the premises is not altogether clear, but, in any event, proceedings for this purpose could be instituted only in the courts of Maryland.

It appears from the papers transmitted with your letter that your inquiry relates to certain matters of much broader scope than the jurisdiction of the mayor of Glen Echo. I understand from these papers that you desire advice as to the jurisdiction of the United States and the powers conferred upon your Department with respect to so much of the above-mentioned "Conduit road" as lies within the limits of the State of Maryland. With regard to this road, the material facts seem to be substantially as follows:

In 1852 and 1853 the Congress authorized and made necessary appropriations for the construction of works to furnish the cities of Washington and Georgetown an abundant supply of water and for the acquisition of such lands as might be needed for these purposes. In 1853 the legislature of Maryland passed an act whereby it was provided that "consent is hereby given to the United States to purchase such lands and to construct such dams, reservoirs, buildings, and other works, and to exercise concurrently with the State of Maryland such jurisdiction over the same as may be necessary for the said purpose." Large sums of money were from time to time appropriated by the Congress for the completion of the works connected with this water supply, and by an act approved March 3, 1859, the President was directed to "place the dams, aqueducts, water gates, reservoirs, and all fixtures and improvements connected therewith, together with the lands, houses, fencing, water and other rights and appurtenances connected with the same and belonging to the United States under the immediate care, management, and superintendence of a

properly qualified officer of the United States Corps of Engineers." * The same act forbade any pollution of the water supply under penalty of fine and imprisonment. In none of these acts is there any authority to make this road; but in 1871 $10,000 was appropriated for "macadamizing the top of the conduit *now used as the main road to Washington.*" In fact, a road had been constructed a number of years previously over or in close proximity to the conduit, to aid in building the latter and the other works and afterwards in keeping them in repair. It would seem that the use of this road as an approach to Washington had already become general among the citizens of the neighboring districts of Maryland prior to 1871, and macadamization of the surface was then recommended to prevent possible injury to the masonry of the conduit by reason of deep ruts in the said road, caused by heavy vehicles passing over it in rainy weather. No Federal statute appears to have been ever passed declaring this road a highway or even expressly authorizing its construction, but for more than forty years the road appears to have been, in fact, used notoriously for highway purposes. The land in which the conduit is laid and over which the road runs has been throughout purchased by the United States in fee, and neither the State of Maryland nor Montgomery County nor the town of Glen Echo nor, so far as I am aware, any other authority, corporation, or individual has contributed to the cost of the road's maintenance and repair, all of which has been defrayed through liberal appropriations made by the Congress. The road is, for about 11 miles, within the limits of the State of Maryland, and, for about 1 mile, within those of the town of Glen Echo.

Article 1, section 8, of the Constitution provides that the Congress shall have power "to exercise exclusive legislation in all cases whatsoever over such district (not exceed-

* Section 1800, Revised Statutes, contains the following provision: "The Chief of Engineers shall have the immediate superintendence of the Washington Aqueduct, together with all rights, appurtenances, and fixtures connected with the same, and belonging to the United States, and of all other public works and improvements in the District of Columbia in which the Government has an interest, and which are not otherwise specifically provided for by law."

ing 10 miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

There can be no question and, so far as I am aware, none has been raised that the word "buildings" in this passage is used in a sense sufficiently broad to include public works of any kind; but it has been suggested that, inasmuch as the works specifically mentioned are all of a military character, lands can thus be acquired only for purposes "needful" to the national defense. While this view is not wholly unsupported by authority, it is in conflict with the opinion of my predecessor in the matter of the New York post-office site, hereinafter cited, and to which reference is made, with approval, by the Supreme Court in the *Leavenworth* case, mentioned *infra*, as well as with the weight of authority in State courts, and, in my opinion, this provision of the Constitution contemplates the purchase of land "needful," for any reason, to the discharge of any of the constitutional duties or the exercise of any of the constitutional powers of the United States. In this case the consent of the State of Maryland was clearly given to the purchase of the land, and, if the land was acquired for a "needful" purpose, as thus contemplated by article 1, section 8, of the Constitution, it seems clear that the power of legislation over such land vested in the Congress as soon as it was acquired with such consent. In the language of the Supreme Court (*Fort Leavenworth Railroad Company* v. *Lowe*, 114 U. S., pp. 532, 533):

"When the title is acquired by purchase by consent of the legislatures of the States, the Federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other au-

thority than that of Congress, and that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals and of the Attorneys-General."

It is immaterial to inquire whether the legislature of Maryland meant to impose any restriction or limitation upon its cession of jurisdiction by the act of 1853, above quoted, for, the consent of the State to the purchase being once given, the cession takes place by virtue of the Constitution itself, and any attempt to impose a restriction by the legislature would be unconstitutional and, therefore, void. In an opinion relative to the New York post-office site, under date of May 6, 1861, Attorney-General Bates said (10 Op., 39):

"As to the act of *consent* by the legislature of New York, I remark, in the first place, if it do not amount to a consent to the purchase then it is simply null, and the United States hold the land, without exclusive jurisdiction. In the second place, if it do amount to *consent*, then any exceptions, reservations, or qualifications contained in the act are void, because, consent being given by the legislature, the Constitution vests in Congress exclusive legislation over the place, beyond the reach both of Congress and the legislature of New York."

I do not think there is any room for doubt that, in this case, the consent to the purchase was given; and, such being the case, I have only to inquire whether the purpose for which the land was purchased came within the terms of the Constitution.

The framers of the Constitution, having provided for a seat of government for the Union, must be presumed to have anticipated the reasonable and necessary consequences of such provision, one being that a considerable population, including large numbers of persons engaged in the work of government, would be collected together within the territory to be acquired for this purpose; and, as this territory was to be of very limited area, they must be further presumed to have anticipated that works indispensable to the welfare of its inhabitants, and necessarily under the control of its government (which was to be likewise the govern-

laws of Maryland confer upon the mayor of the town of Glen Echo no authority to impose or collect fines, either for violations of the ordinances of that town or for offenses against the laws of the State of Maryland; second, that the Congress has the right of exclusive jurisdiction over the entire length of the Conduit road, supposing, as I understand to be the fact, that its entire roadbed is owned in fee by the United States, and has been acquired in accordance with the consent of the legislature of the State of Maryland to such acquisition contained in the act of 1853; third, that the said Conduit road is not a public highway, but is subject to the control of the officer designated by the President in accordance with the act of 1859, and that its use by the public may be subjected to such regulations as may be appropriate, obedience to which regulations may be secured by the use of such reasonably sufficient force as you may deem advisable.

I remain, sir, yours very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

CIVIL SERVICE—ELIGIBILITY—MEMBERS OF THE SAME FAMILY.

An applicant for a position in the competitive classified service who resides with her father, a clerk in the Post-Office Department, and who has two brothers also in the classified service who maintain separate homes apart from their father, is entitled to appointment if otherwise qualified under the civil-service law.

Children who have established and maintain separate homes apart from their parents are no longer members of the same family as their parents within the meaning of section 9 of the civil-service act of January 16, 1883 (22 Stat., 406).

DEPARTMENT OF JUSTICE,
July 12, 1907.

SIR: I have the honor to acknowledge receipt of your letter of June 5, enclosing a communication from the Civil Service Commission, in which reference is made to my opinion of May 25, 1907 (*ante*, p. 260), in regard to the

question of the maxim *nullum tempus occurrit regi*, inasmuch as the Congress had no right to acquire land for use as a highway, the case is disposed of under the principle asserted in *Sapp* v. *Northern Central Railway Company* (51 Md., p. 124), in which case the court says:

"It is familiar and elementary law that title by prescription is founded on the presumption of a grant, and it follows from this that in order to establish a prescriptive right it must be claimed under and through some one who had *a right to grant or create* the easement claimed."

I think the legal incidents of this roadway are similar to those of a so-called "street" in a navy-yard or arsenal. It was constructed for the benefit of the Government and not of the public generally, and the fact that its use by many of the public may have been tolerated for a long time does not prevent the Government from restricting or even forbidding such use should this course seem advisable.

While the use is permitted, however, it would seem that it ought to be permitted under reasonable regulations, and I see no reason to doubt that the officer under whose superintendence and control the road has been placed by the President, in pursuance of the act of Congress of 1859, may prescribe such regulations in the absence of any Federal statute regulating the subject-matter. He has, indeed, no power to fine or imprison, or otherwise punish persons who may violate these regulations, but he can exclude them from the use of the road if they are disorderly or refuse to recognize his authority, and such military force may be appropriately placed under his command as will insure obedience to his orders.

In the papers submitted with your letter, the question is discussed as to whether, if the Conduit road were closed to the public, this would affect the right of travelers on intersecting roads to cross it. So far as I can perceive, this question has not yet arisen practically, and, inasmuch as there seems to be no reason to expect that it will necessarily arise in the near future, I think it will be advisable to reserve its consideration until its determination may be needed for some useful and practical purpose.

I advise you, therefore, first, that, in my opinion, the

laws of Maryland confer upon the mayor of the town of Glen Echo no authority to impose or collect fines, either for violations of the ordinances of that town or for offenses against the laws of the State of Maryland; second, that the Congress has the right of exclusive jurisdiction over the entire length of the Conduit road, supposing, as I understand to be the fact, that its entire roadbed is owned in fee by the United States, and has been acquired in accordance with the consent of the legislature of the State of Maryland to such acquisition contained in the act of 1853; third, that the said Conduit road is not a public highway, but is subject to the control of the officer designated by the President in accordance with the act of 1859, and that its use by the public may be subjected to such regulations as may be appropriate, obedience to which regulations may be secured by the use of such reasonably sufficient force as you may deem advisable.

I remain, sir, yours very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

CIVIL SERVICE—ELIGIBILITY—MEMBERS OF THE SAME FAMILY.

An applicant for a position in the competitive classified service who resides with her father, a clerk in the Post-Office Department, and who has two brothers also in the classified service who maintain separate homes apart from their father, is entitled to appointment if otherwise qualified under the civil-service law.

Children who have established and maintain separate homes apart from their parents are no longer members of the same family as their parents within the meaning of section 9 of the civil-service act of January 16, 1883 (22 Stat., 406).

DEPARTMENT OF JUSTICE,

July 12, 1907.

SIR: I have the honor to acknowledge receipt of your letter of June 5, enclosing a communication from the Civil Service Commission, in which reference is made to my opinion of May 25, 1907 (*ante*, p. 260), in regard to the

effect of section 9 of the act of January 16, 1883 (22 Stat., 406). The Commission requests to be further advised as to the effect of this section, and submits for my consideration the case of Miss Mabel L. Stratton, who is an applicant for a position in the competitive classified service. It appears that Miss Stratton is a daughter of Samuel R. Stratton, at present employed as a clerk in the Post-Office Department; that she has a brother who is a clerk in the office of the Civil Service Commission, and another brother who is employed in the United States custom-house in Philadelphia. Miss Stratton resides with her father in the city of Washington. Both her brothers maintain separate homes and live apart from their father.

Section 9 of the act of January 16, 1883, supra, reads as follows:

"That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any of said grades."

Miss Stratton's eligibility for appointment, therefore, depends upon whether her father, Samuel R. Stratton, and his two sons are members of a family within the meaning of the act.

In the Century Dictionary "family" is defined as "that collective body of persons who form one household, under one head and one domestic government, including parents, children, and servants."

In the Worcester Dictionary the definition is given as "persons collectively who live together in a house or under one head."

In the Webster Dictionary the definitions are: "The collective body of persons who live in one house and under one head or management; a household including parents, children, and servants, and, as the case may be, lodgers or boarders; the group consisting of husband and wife and their dependent children, constituting a fundamental unit in the organization of society."

In *Dodge* v. *The Boston and Providence Railroad Company* (154 Mass., 299, 301), the following language is used in regard to the signification of the word "family:" "Its

primary meaning is the collective body of persons who live in one house and under one management * * *. Unless the context manifests a different contention, the word 'family' is usually construed in its primary sense."

This definition is quoted with approval in *Poor* v. *The Hudson Insurance Company* (2 Fed., 432, 438).

Possibly the most satisfactory definition of the legal meaning of the word "family" is contained in the opinion of Lord Chief Justice Kenyon in *King* v. *Darlington* (4 T. R., 797), in which he says:

"In common parlance, the family consists of those who live under the same roof with the pater familias—those who form, if I may use the expression, his fireside; but when they branch out and become heads of new establishments, they cease to be part of the father's family."

Applying these definitions to the case under consideration, it seems clear that the sons of Samuel R. Stratton are no longer members of his family within the meaning of the civil-service act. That being so, it is clear that there is but one member of the family at present employed in the classified civil service, and that Miss Mabel Stratton is therefore eligible to appointment if otherwise qualified under the civil-service act and rules.

Respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

NAVAL BRIGADE—NATIONAL GUARD—ORGANIZED MILITIA.

Those portions of the military organizations of the several States, Territories, and the District of Columbia that are intended for naval service are portions of the organized militia, and as such are entitled to participate in the contest for prizes and trophies provided for in the act of March 2, 1907 (34 Stat., 1175).

The terms "National Guard" or "Organized Militia," as used in the act of March 2, 1907 (34 Stat., 1175), embrace the whole of the militia organized under the laws of the States or Territories, whether intended for land or naval service, and are not restricted to such portions thereof as are intended for land service only.

Argument in favor of a particular construction of a statute because other statutory provisions have that meaning, though permissible, is not of great force.

DEPARTMENT OF JUSTICE,
July 15, 1907.

SIR: In your note of July 8, 1907, with its inclosures, to which I have the honor to reply, you ask my opinion in substance whether those portions of the militia of the several States, organized as naval brigades or for naval service are entitled to participate in the contest for prizes and trophies provided for by the act of March 2, 1907 (34 Stat., 1175). You transmit also the opinion of the Judge-Advocate-General of the Army, adverse to such right, with which you express your concurrence; and a note from the Secretary of the Navy, expressing a contrary opinion, concurred in by the attorney-general and chief of staff of Massachusetts; and a memorandum of authorities in support of the right to thus participate. Specifically the question arises as to the right of the naval brigade of Massachusetts to participate in the national contest to be held at Camp Perry, Port Clinton, Ohio, on August 29, 1907.

The act referred to is one of several for the promotion of the efficiency and usefulness of the militia by teaching, training, and practice, and to this end provision is made for annual competitive contest to be "open to the Army, Navy, Marine Corps, and the National Guard or organized militia of the several States, Territories, and of the District of Columbia." And the question is whether that portion of the militia of the State organized as a naval brigade or for naval service is embraced in the above designation, "National Guard," or "Organized Militia;" for if they are so included, then by the express terms of the act they are entitled to thus participate, even though in some other acts upon the same subject the same terms are evidently not intended to include them.

The act of January 21, 1903 (32 Stat., 775), "to promote the efficiency of the militia, and for other purposes," provides—

"That the militia shall consist of every able-bodied male of the respective States, Territories, and the District of

Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes—the Organized Militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories, and the remainder to be known as the reserve militia."

Thus all male persons, of the description mentioned, except as stated in the next section, are part of and constitute the militia of the several States, Territories, and District, and when organized into regiments, battalions, companies, or naval brigades, and officered, under the laws of the State they are organized militia by such designations as the State may give them.

And this is equally so, no matter whether they are thus organized for land or for naval service. It is impossible to say that when a portion of this "militia" is thus organized it is or is not a portion of the organized militia, dependent upon the branch of the military service for which it is intended. The designation "National Guard," "Organized Militia," or "such other designations as may be given them by the laws of the respective States or Territories," are but names used to identify these organized portions of the militia and distinguish them from the unorganized portions, or "reserve," and not at all to indicate the branch of military service for which it is intended. This is so manifest as not to require argument.

And it is equally certain that any and every law referring to organized militia, national guard, by whatever name called, unless it should be otherwise expressly stated, refers prima facie to those portions of this militia which are thus organized, and equally so, no matter whether intended for land or for naval service. When it is intended to distinguish the naval from the land portion, this is done by language which does not necessarily mean the whole, instead of merely a portion. And if not so done when intended, the language must still be taken to mean just what it plainly says.

It must then be taken as beyond serious doubt that the terms "National Guard" or "Organized Militia," as used in the act of March 2, 1907, supra, refers to the whole of the militia thus organized under the laws of the States or Territories, and are not restricted to such portions thereof as are intended for land service. That is the plain meaning of the language, and it must be so held.

It is believed that the statutory provisions above referred to do not permit construction of any kind, either by reference to other acts or to other portions of the same act. The meaning of the language used, in its ordinary sense, is plain, unambiguous, and certain; and being so, we are forbidden by a familiar rule of law to resort to construction of any kind to make it mean something different.

Indeed, the whole question may be very tersely disposed of. Thus, if these naval brigades, by whatever name they may be called, are "able-bodied male citizens," or are, in so far as not citizens, "able-bodied males of foreign birth, who have declared their intention to become citizens," between the ages of 18 and 45 years, and are not within the exemptions of the second section, then under the first section of the above act of 1903 they necessarily belong to the "militia." And, as the entire militia is divided into two classes, the "organized militia" and the unorganized "reserve militia," it follows that, if formed into known military organizations under the laws of their respective States or Territories, they belong to the "organized" and not to the unorganized "reserve militia," for there is nothing else to which they can belong. This disposes of the whole question, and it seems to leave no alternative disposition or room for construction.

But for some other provisions on the same subject it is believed that no one can seriously doubt that the terms "National Guard," "Organized Militia," as used in the statutes above referred to, embrace the whole of the organized militia and not merely that portion intended for land service. If this be so, this of itself forbids us to examine the other acts with a view to a different meaning.

But you invite my attention to the opinion of the acting Judge-Advocate-General of the Army, transmitted with

your note, which opens the whole field of construction, and especially that based upon a consideration of other acts of Congress upon the same general subject.

And, first, it may be said that this argument in favor of a particular construction because other provisions have or must have that meaning is not of great force, at the best. It is based upon some sort of presumption that the legislative body is always consistent in using the same language upon the same subject, with the same meaning, or in having the same intention or meaning in its enactments upon the same subject at different times. The reverse of this is so often true that while this mode of construction is sometimes permissible, it is not of great force.

In the opinion above referred to of the Acting Judge-Advocate-General of the Army there is an exhaustive reference to the various acts of Congress, early and recent, referring to the militia, land and naval, for the purpose of showing that, as he says, Congress did not regard that portion intended for naval service as part of the organized militia; and that Congress has frequently made specific appropriations expressly stated to be for the naval militia, thus also showing, as he thinks, that Congress did not consider them as constituting any portion of the organized militia.

As to the first, it may be observed that, with the exceptions referred to below, those acts were before the act of January 21, 1903, expressly defining and declaring what constitutes the organized militia. So that if the conclusion were correct that this earlier legislation shows that Congress then regarded only the land militia as being the organized militia, this could not, in the slightest degree, affect the meaning of the act of 1903, expressly declaring what shall thereafter constitute this organized militia or national guard. No matter what was the case before that act, after its passage the organized militia were those who, under the laws of the several States and Territories, were formed into the known military organizations, whether for land or sea service.

This is equally true as to the acts making specific appropriations for, or specific reference to, that portion of the

militia organized for sea purposes, even if, by possibility, these were not regarded as being any portion of the organized militia. Still that act made them such, for as they necessarily belong to the militia, as does any able-bodied man subject to military service, and are certainly not in the unorganized militia "reserve," it follows that they are of the organized militia, as of course.

But there is another satisfactory reason why the legislation here considered affords no indication that Congress did not regard this naval militia as any portion of the organized militia. These branches of the military service are essentially different in their organization, arms, equipment, quartermaster's supplies, etc., and, while in statutes the language and terms usually used in reference to the Army would be generally appropriate with reference to the land militia, yet, when statutes, appropriation or otherwise, have specific reference to the naval militia, it is necessary to have some distinctive name to point out their specific reference. And that is all that is done by this legislation, specifically for the naval militia. And as this distinctive specific legislation would be equally appropriate and necessary, whether the naval militia was or was not regarded as a portion of the organized militia, there is, of course, no implication either way. And this applies to such specific legislation since the defining act of 1903.

The only legislation that is referred to as showing that Congress did not regard these naval brigades as being portions of the organized militia which might cause any appreciable hesitation on my part is that portion of section 3 of the act of January 21, 1903, relating to the organization, armament, and discipline of the organized militia, and requiring those to conform to the rules prescribed for the Army. This section provides that—

"The organization, armament, and discipline of the organized militia in the several States and Territories and in the District of Columbia shall be the same as that which is now or may hereafter be prescribed for the Regular and Volunteer Army of the United States within five years from the date of the approval of this act."

While this language in terms embraces the entire organ-

ized militia, land or naval, it is manifest that the provision can not be executed as to the naval brigades, for these are, and are required to be, organized, armed, and disciplined under different rules and regulations.

If there were any doubt whether section 1 of the act of January 21, 1903, *supra*, included all of the organized militia, land and naval, this provision would tend to show that it did not, but that only that portion of the organized militia intended for land service was included. But, as to any question here, this is its only office or effect. We are not considering here whether this part of section 3 can be carried into effect as to that portion of the organized militia intended for naval service, but are concerned only with the question how far, if at all, this provision operates to limit or restrict the meaning of section 1 of that act. I refer again specifically to that section.

After declaring that, with the exceptions stated, every able-bodied man, subject to military duty, shall constitute the militia, it says, "and shall be divided into two classes—the organized militia, to be known as the national guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective States and Territories, and the remainder to be known as the reserve militia."

It is absolutely certain that every person subject to military duty is embraced in this section, as a portion of the militia, and equally certain that all those who are organized into known military organizations, under the laws of the State, Territory, or District, and by whatever name called, are portions of the organized militia within that section. There are but the two classes—the organized and the unorganized or reserve militia.

And this is not changed by the fact that Congress has, by inadvertence or otherwise, made a provision in terms applicable to the whole, which can be carried into effect as to only a part. Such instances of general language so broad as to necessarily embrace more than was intended are not unusual. But it is certain that this provision of section 3 does not and can not change the plain meaning of section 1 of the act.

If anything further was necessary it might be pointed out that the act of March 2, 1907, making appropriation for this coming contest, makes express reference to the act of 1903, which so plainly declares that all those State organizations shall constitute the Organized Militia and with full knowledge that the act referred to included the naval as well as the land organizations in the "Organized Militia," still used as before the term "Organized Militia." And further, that if, as is claimed, Congress actually had it in mind, and did not intend that these naval organizations should participate in these contests, then in view of the plain meaning of the act of 1903 something different from this would have been said to express this intention.

Nor is there anything incongruous or incompatible in the idea of a naval militia to suggest its exclusion when the militia is mentioned. While a more or less organized land militia is as old as the feudal system, a naval militia, in this country, at least, is of modern date. And yet it was well known and Congress had made frequent appropriations for it. And indeed when we consider the difficulties of manning our Navy with American seamen, it may well be thought that a naval militia from which recruits for this purpose may be drawn is quite as necessary as are such organizations for the Army. And inasmuch as the naval service peculiarly requires practice and training in order to be of any usefulness whatever, it would seem strange that Congress should purposely debar from its training and practice those who most need it. I do not think it has done so.

I am therefore of opinion that those portions of the military organizations of the several States, Territories, and the District of Columbia that are intended for naval service are portions of the organized militia, and as such are entitled to participate in the contest for prizes and trophies provided for in the act of March 2, 1907, and other acts for the same purpose.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

DRUGS AND MEDICINE ACT—STANDARDS OF PURITY—FOOD AND DRUGS ACT.

In applying the drugs and medicine act of June 26, 1848 (9 Stat., 237), to importations originating in Italy, the standard of strength and purity to be enforced is that established by the pharmacopœia of the United States, and not that of Italy or any other foreign country.

Importations originating in any of the countries whose pharmacopœias are mentioned in section 2935, Revised Statutes, must conform to the pharmacopœia of the country of their origin; but if produced in any other country, whose pharmacopœias are not thus standardized, then the pharmacopœia of the United States must control.

When the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the Department charged with its execution, and where such construction has been uniform and long continued it should not be disregarded without the most cogent reasons, and still greater weight should be given where the statute has been subsequently reenacted by Congress.

The drugs and medicine act of 1848 and the food and drugs act of June 30, 1906 (34 Stat., 768), are, generally speaking, cumulative and should both be given effect, and an importation of drugs should not be admitted if it fails to conform to the standard established by the former or to the tests imposed under the latter.

Drugs imported from Italy, although meeting the standard required by the drugs and medicine act of 1848, are still subject to the provisions of the food and drugs act of 1906 regarding adulteration, misbranding, and false labeling, and to any test that may be applied to them by the direction of the Secretary of Agriculture in accordance with section 11 of the latter act.

The provisions of the drugs and medicine act of 1848, now incorporated in section 2936, Revised Statutes, that importations found to conform to the standard therein imposed shall be thereupon "passed without reservation, on payment of the customary duties," are repealed by implication, as applied to importations which are subject to rejection under tests of the food and drugs act.

DEPARTMENT OF JUSTICE,
July 17, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of the 10th ultimo, in which, in connection with an application for reexamination of certain lemon and orange oil imported by G. H. Reitmann at the port of New York, which has been denied entry by the appraiser, you request

If anything further was necessary it might be pointed out that the act of March 2, 1907, making appropriation for this coming contest, makes express reference to the act of 1903, which so plainly declares that all those State organizations shall constitute the Organized Militia and with full knowledge that the act referred to included the naval as well as the land organizations in the "Organized Militia," still used as before the term "Organized Militia." And further, that if, as is claimed, Congress actually had it in mind, and did not intend that these naval organizations should participate in these contests, then in view of the plain meaning of the act of 1903 something different from this would have been said to express this intention.

Nor is there anything incongruous or incompatible in the idea of a naval militia to suggest its exclusion when the militia is mentioned. While a more or less organized land militia is as old as the feudal system, a naval militia, in this country, at least, is of modern date. And yet it was well known and Congress had made frequent appropriations for it. And indeed when we consider the difficulties of manning our Navy with American seamen, it may well be thought that a naval militia from which recruits for this purpose may be drawn is quite as necessary as are such organizations for the Army. And inasmuch as the naval service peculiarly requires practice and training in order to be of any usefulness whatever, it would seem strange that Congress should purposely debar from its training and practice those who most need it. I do not think it has done so.

I am therefore of opinion that those portions of the military organizations of the several States, Territories, and the District of Columbia that are intended for naval service are portions of the organized militia, and as such are entitled to participate in the contest for prizes and trophies provided for in the act of March 2, 1907, and other acts for the same purpose.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

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Importations originating in any of the countries whose pharmacopœias are mentioned in section 2935, Revised Statutes, must conform to the pharmacopœia of the country of their origin; but if produced in any other country, whose pharmacopœias are not thus standardized, then the pharmacopœia of the United States must control.

When the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the Department charged with its execution, and where such construction has been uniform and long continued it should not be disregarded without the most cogent reasons, and still greater weight should be given where the statute has been subsequently reenacted by Congress.

The drugs and medicine act of 1848 and the food and drugs act of June 30, 1906 (34 Stat., 768), are, generally speaking, cumulative and should both be given effect, and an importation of drugs should not be admitted if it fails to conform to the standard established by the former or to the tests imposed under the latter.

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The provisions of the drugs and medicine act of 1848, now incorporated in section 2936, Revised Statutes, that importations found to conform to the standard therein imposed shall be thereupon "passed without reservation, on payment of the customary duties," are repealed by implication, as applied to importations which are subject to rejection under tests of the food and drugs act.

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an expression of my opinion upon certain questions arising under the drugs and medicine act of 1848 and the food and drugs act of 1906.

1. The first question submitted is whether in applying the drugs and medicine act of 1848 to importations originating in Italy, the standard of strength and purity to be enforced is that established by either the Italian pharmacopœia or by any of the foreign pharmacopœias mentioned in the act.

The drugs and medicine act of 1848, which is embodied in sections 2933 to 2937 of the Revised Statutes, provides that all drugs, medicines, and medicinal preparations shall, before pasing the custom-house, be examined in reference to their quality, purity, and fitness for medical purposes (sec. 2933); that if they are found, "in the opinion of the examiner, to be so far adulterated or in any manner deteriorated, as to render them inferior in strength or purity to the *standard* established by the United States, Edinburgh, London, French, and German pharmacopœias and dispensatories, and thereby improper, unsafe, or dangerous to be used for medicinal purposes, a return to that effect shall be made upon the invoice, and the articles so noted shall not pass the custom-house" (sec. 2935) unless the owner or consignee shall call for an analytical reexamination at his own expense, when the collector shall cause a careful analysis of the articles to be made by a competent analytical chemist (secs. 2935, 2936); that the sworn report of this chemist shall be final, and if it declares "the return of the examiner to be erroneous and the articles to be of the requisite strength and purity according to the *standards* referred to in the next preceding section, the entire invoice shall be passed without reservation, on payment of the customary duties" (sec. 2936); but that if the report sustains the examiner's return, the articles shall be reexported within six months or the collector shall cause them to be destroyed (sec. 2937).

The Italian pharmacopœia, it will be seen, is not one of those made a standard by the act.

The ambiguity of the language in the act, especially in the use of the words "standard" in one section and "stand-

ards" in another, makes it doubtful, as an original question, whether it was intended to require an importation of drugs and medicines to conform to the several standards of each and all of the pharmacopœias mentioned, or to the standards of any one of them, or to the general standard established by them all considered together, so that an importation falling below the standard of all of them would necessarily be excluded, but if meeting the standard of some of them, but not of others, it would not be excluded unless it fell so far below the general standard as to render its use improper, unsafe, or dangerous.

The construction of the act, therefore, being one of doubt, it is proper to resort to the construction which has been placed upon it by the Treasury Department. (22 Opin., 163, 167.)

It appears that almost immediately after the passage of this act a definite construction was placed upon it by the Treasury Department, which has been uniformly followed to the present day. I am advised that in article 249 of the Customs Regulations published by the Treasury Department in 1857, being the first edition after the passage of the act of 1848, the following reference was made to the drugs and medicine act:

"It will be observed, on reference to the third section of the act, that all imported 'drugs, medicines, and medicinal preparations, etc.,' are to be tested in reference to their strength and purity by the standards established by the United States, Edinburgh, London, French, and German pharmacopœias and dispensatories. It is not conceived to be the intention of the law that the articles referred to should conform in strength and purity to each and all of those standards, as such conformity is believed to be impracticable, owing to the variations in those standards. If, therefore, the articles in question be manufactured, produced, or prepared in England, Scotland, France, or Germany, as the case may be, and prove to conform in strength and purity to the pharmacopœia and dispensatory of the country of their origin, said articles become exempt from the penalties of the law. All articles of the kind mentioned produced, manufactured, or prepared in any other

country than those before mentioned must conform to the qualities stated in the United States pharmacopœia and dispensatory."

I am further advised that the construction thus given to the drugs and medicine act has been retained in all subsequent editions of the Customs Regulations, article 1285 of the Customs Regulations of 1889, which are now in force, providing that if imported drugs, medicines, and medicinal preparations are "manufactured, produced, or prepared in England, Scotland, France, or Germany, and conform in strength and purity to the pharmacopœia and dispensatory of the country of their origin, they are exempt from the penalties of the law; but if produced, manufactured, or prepared in any other country than those last mentioned, they must conform to the United States pharmacopœia and dispensatory."

It is a well-settled rule that "when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the Department charged with its execution, where the construction has for many years controlled the conduct of the public business," and that uniform and long-continued executive construction is "not to be disregarded without the most cogent and persuasive reasons" (*Robertson* v. *Downing*, 127 U. S., 607; *United States* v. *Healey*, 160 U. S., 136, 141), the weight to be given such construction being greater where the statute has been subsequently reenacted by Congress (*United States* v. *Falk*, 204 U. S., 143, 152).

Applying this rule of construction, I am of opinion that, in view of the great doubt as to the true meaning of the original act of 1848, the construction which has been uniformly given to its provisions by the Treasury Department for more than half a century should not now be disregarded, especially in view of the fact that it was reenacted in the Revised Statutes after this construction had been given for many years, and that the provisions of the Revised Statutes in which the act is embodied are to be now construed in comformity with the Customs Regulations, that is to say, that if the importation originates in any of the countries whose pharmacopœias are mentioned

such pharmocopœia is to be the standard, but if it originates in any other country, then the United States pharmacopœia is to control; and hence, to specifically answer your question, that in enforcing the provisions of the drugs and medicine act of 1848 in reference to an importation originating in Italy, the pharmacopœia whose standard is to be applied is not that of Italy or any other foreign country, but that of the United States.

2. The other question which you submit is: Whether the conformity of such importation to the standard imposed by the act of 1848 entitles it to admission into this country as against any test which may be applied by the direction of the Secretary of Agriculture under section 11 of the food and drugs act of June 30, 1906, or whether the provisions of the act of 1906 regarding adulteration, misbranding, and false labeling are also to be applicable.

The food and drugs act of 1906 (34 Stat., 768), is a general act relating to the manufacture, sale, and transportation of adulterated or misbranded food or drugs. It defines specifically the various cases in which any food or drug shall be deemed to be adulterated or misbranded and provides in section 11 that—

"The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony; and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the con-

signee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe."

Comparing the drugs and medicine act and the food and drugs act, it will be seen that not only is the one special and the other general, but that, in reference to the importation of drugs, while the drugs and medicine act, on the one hand, contains no restriction as to misbranding, each of the two acts, on the other hand, imposes certain tests in regard to the admission of imported drugs which are not contained in the other.

In an opinion which I rendered the Secretary of the Treasury on February 23, 1907, in reference to the tea inspection act of 1897, the effect of the food and drugs act upon an earlier special statute was carefully considered (26 Opin., 166). For reasons analogous to those which are therein stated, I am of the opinion that in the matter of the importation of drugs, the drugs and medicine act and the food and drugs act are, generally speaking, cumulative and should both be given effect, and that an importation of drugs should not be admitted if it fails to conform either to the standard established by the drugs and medicine act or to the tests imposed under the food and drugs act; and, hence, to reply specifically to your question, that drugs imported from Italy, although meeting the standard required by the drugs and medicine act, are still subject to the provisions of the food and drugs act regarding adulteration, misbranding, and false labeling, and to any test that may be applied to them by the direction of the Secretary of Agriculture in accordance with section 11 of that act.

It follows of course that the provisions of the drugs and medicine act, that importations found to conform to the standard therein imposed shall be thereupon "passed without reservation, on payment of the customary duties" (R. S., 2936) are repealed by implication, as applied to importations which are subject to rejection under the tests of the food and drugs act.

In this connection it should be noted that if, as I have been advised, the laws of Italy forbid the sale of a drug which does not conform to the standard of the Italian

pharmacopœia, it would follow that although a drug imported from Italy might not be subject to exclusion under the drugs and medicine act by reason of non-conformity to the Italian pharmacopœia, it might still be excluded under section 11 of the food and drugs act as being "of a kind forbidden entry into or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported."

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

CREEK ALLOTMENTS—PERIOD OF ALIENATION.

The period of five years within which lands allotted to Creek citizens may not be alienated, except with the approval of the Secretary of the Interior, began to run from August 8, 1902, the date of the President's proclamation announcing the ratification by the Creek Nation of the agreement contained in the act of June 30, 1902 (32 Stat., 500).

DEPARTMENT OF JUSTICE,
July 17, 1907.

SIR: By your letter of the 19th ultimo my opinion was requested upon certain questions arising in the administration of the laws relating to the allotment of lands in the Creek Nation. On July 13, because of your being advised as to the pendency of certain cases in the courts involving some of these questions, you withdrew your request for an opinion as to those *sub judice*, leaving for my determination only the following question:

"Did the period of five years within which lands allotted to Creek citizens may not be alienated, except with the approval of the Secretary of the Interior, begin to run June 30, 1902, date of approval of the act ratifying the agreement with the Creeks, July 26, 1902, date of ratification of said agreement by the Creek council, or August 8, 1902, date of the President's proclamation?"

The supplemental agreement with the Creek Nation,

If anything further was necessary it might be pointed out that the act of March 2, 1907, making appropriation for this coming contest, makes express reference to the act of 1903, which so plainly declares that all those State organizations shall constitute the Organized Militia and with full knowledge that the act referred to included the naval as well as the land organizations in the "Organized Militia," still used as before the term "Organized Militia." And further, that if, as is claimed, Congress actually had it in mind, and did not intend that these naval organizations should participate in these contests, then in view of the plain meaning of the act of 1903 something different from this would have been said to express this intention.

Nor is there anything incongruous or incompatible in the idea of a naval militia to suggest its exclusion when the militia is mentioned. While a more or less organized land militia is as old as the feudal system, a naval militia, in this country, at least, is of modern date. And yet it was well known and Congress had made frequent appropriations for it. And indeed when we consider the difficulties of manning our Navy with American seamen, it may well be thought that a naval militia from which recruits for this purpose may be drawn is quite as necessary as are such organizations for the Army. And inasmuch as the naval service peculiarly requires practice and training in order to be of any usefulness whatever, it would seem strange that Congress should purposely debar from its training and practice those who most need it. I do not think it has done so.

I am therefore of opinion that those portions of the military organizations of the several States, Territories, and the District of Columbia that are intended for naval service are portions of the organized militia, and as such are entitled to participate in the contest for prizes and trophies provided for in the act of March 2, 1907, and other acts for the same purpose.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

DRUGS AND MEDICINE ACT—STANDARDS OF PURITY—FOOD AND DRUGS ACT.

In applying the drugs and medicine act of June 26, 1848 (9 Stat., 237), to importations originating in Italy, the standard of strength and purity to be enforced is that established by the pharmacopœia of the United States, and not that of Italy or any other foreign country.

Importations originating in any of the countries whose pharmacopœias are mentioned in section 2935, Revised Statutes, must conform to the pharmacopœia of the country of their origin; but if produced in any other country, whose pharmacopœias are not thus standardized, then the pharmacopœia of the United States must control.

When the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the Department charged with its execution, and where such construction has been uniform and long continued it should not be disregarded without the most cogent reasons, and still greater weight should be given where the statute has been subsequently reenacted by Congress.

The drugs and medicine act of 1848 and the food and drugs act of June 30, 1906 (34 Stat., 768), are, generally speaking, cumulative and should both be given effect, and an importation of drugs should not be admitted if it fails to conform to the standard established by the former or to the tests imposed under the latter.

Drugs imported from Italy, although meeting the standard required by the drugs and medicine act of 1848, are still subject to the provisions of the food and drugs act of 1906 regarding adulteration, misbranding, and false labeling, and to any test that may be applied to them by the direction of the Secretary of Agriculture in accordance with section 11 of the latter act.

The provisions of the drugs and medicine act of 1848, now incorporated in section 2936, Revised Statutes, that importations found to conform to the standard therein imposed shall be thereupon "passed without reservation, on payment of the customary duties," are repealed by implication, as applied to importations which are subject to rejection under tests of the food and drugs act.

DEPARTMENT OF JUSTICE,
July 17, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of the 10th ultimo, in which, in connection with an application for reexamination of certain lemon and orange oil imported by G. H. Reitmann at the port of New York, which has been denied entry by the appraiser, you request

an expression of my opinion upon certain questions arising under the drugs and medicine act of 1848 and the food and drugs act of 1906.

1. The first question submitted is whether in applying the drugs and medicine act of 1848 to importations originating in Italy, the standard of strength and purity to be enforced is that established by either the Italian pharmacopœia or by any of the foreign pharmacopœias mentioned in the act.

The drugs and medicine act of 1848, which is embodied in sections 2933 to 2937 of the Revised Statutes, provides that all drugs, medicines, and medicinal preparations shall, before pasing the custom-house, be examined in reference to their quality, purity, and fitness for medical purposes (sec. 2933); that if they are found, "in the opinion of the examiner, to be so far adulterated or in any manner deteriorated, as to render them inferior in strength or purity to the *standard* established by the United States, Edinburgh, London, French, and German pharmacopœias and dispensatories, and thereby improper, unsafe, or dangerous to be used for medicinal purposes, a return to that effect shall be made upon the invoice, and the articles so noted shall not pass the custom-house" (sec. 2935) unless the owner or consignee shall call for an analytical reexamination at his own expense, when the collector shall cause a careful analysis of the articles to be made by a competent analytical chemist (secs. 2935, 2936); that the sworn report of this chemist shall be final, and if it declares "the return of the examiner to be erroneous and the articles to be of the requisite strength and purity according to the *standards* referred to in the next preceding section, the entire invoice shall be passed without reservation, on payment of the customary duties" (sec. 2936); but that if the report sustains the examiner's return, the articles shall be reexported within six months or the collector shall cause them to be destroyed (sec. 2937).

The Italian pharmacopœia, it will be seen, is not one of those made a standard by the act.

The ambiguity of the language in the act, especially in the use of the words "standard" in one section and "stand-

ards" in another, makes it doubtful, as an original question, whether it was intended to require an importation of drugs and medicines to conform to the several standards of each and all of the pharmacopœias mentioned, or to the standards of any one of them, or to the general standard established by them all considered together, so that an importation falling below the standard of all of them would necessarily be excluded, but if meeting the standard of some of them, but not of others, it would not be excluded unless it fell so far below the general standard as to render its use improper, unsafe, or dangerous.

The construction of the act, therefore, being one of doubt, it is proper to resort to the construction which has been placed upon it by the Treasury Department. (22 Opin., 163, 167.)

It appears that almost immediately after the passage of this act a definite construction was placed upon it by the Treasury Department, which has been uniformly followed to the present day. I am advised that in article 249 of the Customs Regulations published by the Treasury Department in 1857, being the first edition after the passage of the act of 1848, the following reference was made to the drugs and medicine act:

"It will be observed, on reference to the third section of the act, that all imported 'drugs, medicines, and medicinal preparations, etc.,' are to be tested in reference to their strength and purity by the standards established by the United States, Edinburgh, London, French, and German pharmacopœias and dispensatories. It is not conceived to be the intention of the law that the articles referred to should conform in strength and purity to each and all of those standards, as such conformity is believed to be impracticable, owing to the variations in those standards. If, therefore, the articles in question be manufactured, produced, or prepared in England, Scotland, France, or Germany, as the case may be, and prove to conform in strength and purity to the pharmacopœia and dispensatory of the country of their origin, said articles become exempt from the penalties of the law. All articles of the kind mentioned produced, manufactured, or prepared in any other

country than those before mentioned must conform to the qualities stated in the United States pharmacopœia and dispensatory."

I am further advised that the construction thus given to the drugs and medicine act has been retained in all subsequent editions of the Customs Regulations, article 1285 of the Customs Regulations of 1889, which are now in force, providing that if imported drugs, medicines, and medicinal preparations are "manufactured, produced, or prepared in England, Scotland, France, or Germany, and conform in strength and purity to the pharmacopœia and dispensatory of the country of their origin, they are exempt from the penalties of the law; but if produced, manufactured, or prepared in any other country than those last mentioned, they must conform to the United States pharmacopœia and dispensatory."

It is a well-settled rule that "when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the Department charged with its execution, where the construction has for many years controlled the conduct of the public business," and that uniform and long-continued executive construction is "not to be disregarded without the most cogent and persuasive reasons" (*Robertson* v. *Downing*, 127 U. S., 607; *United States* v. *Healey*, 160 U. S., 136, 141), the weight to be given such construction being greater where the statute has been subsequently reenacted by Congress (*United States* v. *Falk*, 204 U. S., 143, 152).

Applying this rule of construction, I am of opinion that, in view of the great doubt as to the true meaning of the original act of 1848, the construction which has been uniformly given to its provisions by the Treasury Department for more than half a century should not now be disregarded, especially in view of the fact that it was reenacted in the Revised Statutes after this construction had been given for many years, and that the provisions of the Revised Statutes in which the act is embodied are to be now construed in comformity with the Customs Regulations, that is to say, that if the importation originates in any of the countries whose pharmacopœias are mentioned

such pharmocopœia is to be the standard, but if it originates in any other country, then the United States pharmacopœia is to control; and hence, to specifically answer your question, that in enforcing the provisions of the drugs and medicine act of 1848 in reference to an importation originating in Italy, the pharmacopœia whose standard is to be applied is not that of Italy or any other foreign country, but that of the United States.

2. The other question which you submit is: Whether the conformity of such importation to the standard imposed by the act of 1848 entitles it to admission into this country as against any test which may be applied by the direction of the Secretary of Agriculture under section 11 of the food and drugs act of June 30, 1906, or whether the provisions of the act of 1906 regarding adulteration, misbranding, and false labeling are also to be applicable.

The food and drugs act of 1906 (34 Stat., 768), is a general act relating to the manufacture, sale, and transportation of adulterated or misbranded food or drugs. It defines specifically the various cases in which any food or drug shall be deemed to be adulterated or misbranded and provides in section 11 that—

"The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony; and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the con-

signee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe."

Comparing the drugs and medicine act and the food and drugs act, it will be seen that not only is the one special and the other general, but that, in reference to the importation of drugs, while the drugs and medicine act, on the one hand, contains no restriction as to misbranding, each of the two acts, on the other hand, imposes certain tests in regard to the admission of imported drugs which are not contained in the other.

In an opinion which I rendered the Secretary of the Treasury on February 23, 1907, in reference to the tea inspection act of 1897, the effect of the food and drugs act upon an earlier special statute was carefully considered (26 Opin., 166). For reasons analogous to those which are therein stated, I am of the opinion that in the matter of the importation of drugs, the drugs and medicine act and the food and drugs act are, generally speaking, cumulative and should both be given effect, and that an importation of drugs should not be admitted if it fails to conform either to the standard established by the drugs and medicine act or to the tests imposed under the food and drugs act; and, hence, to reply specifically to your question, that drugs imported from Italy, although meeting the standard required by the drugs and medicine act, are still subject to the provisions of the food and drugs act regarding adulteration, misbranding, and false labeling, and to any test that may be applied to them by the direction of the Secretary of Agriculture in accordance with section 11 of that act.

It follows of course that the provisions of the drugs and medicine act, that importations found to conform to the standard therein imposed shall be thereupon "passed without reservation, on payment of the customary duties" (R. S., 2936) are repealed by implication, as applied to importations which are subject to rejection under the tests of the food and drugs act.

In this connection it should be noted that if, as I have been advised, the laws of Italy forbid the sale of a drug which does not conform to the standard of the Italian

pharmacopœia, it would follow that although a drug imported from Italy might not be subject to exclusion under the drugs and medicine act by reason of non-conformity to the Italian pharmacopœia, it might still be excluded under section 11 of the food and drugs act as being "of a kind forbidden entry into or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported."

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

CREEK ALLOTMENTS—PERIOD OF ALIENATION.

The period of five years within which lands allotted to Creek citizens may not be alienated, except with the approval of the Secretary of the Interior, began to run from August 8, 1902, the date of the President's proclamation announcing the ratification by the Creek Nation of the agreement contained in the act of June 30, 1902 (32 Stat., 500).

DEPARTMENT OF JUSTICE,
July 17, 1907.

SIR: By your letter of the 19th ultimo my opinion was requested upon certain questions arising in the administration of the laws relating to the allotment of lands in the Creek Nation. On July 13, because of your being advised as to the pendency of certain cases in the courts involving some of these questions, you withdrew your request for an opinion as to those *sub judice*, leaving for my determination only the following question:

"Did the period of five years within which lands allotted to Creek citizens may not be alienated, except with the approval of the Secretary of the Interior, begin to run June 30, 1902, date of approval of the act ratifying the agreement with the Creeks, July 26, 1902, date of ratification of said agreement by the Creek council, or August 8, 1902, date of the President's proclamation?"

The supplemental agreement with the Creek Nation,

ratified by the act of Congress approved June 30, 1902 (32 Stat., 500, 503–505), provided:

"16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior.

* * * * *

"21. This agreement shall be binding upon the United States and the Creek Nation and upon all persons affected thereby when it shall have been ratified by Congress and the Creek national council, and the fact of such ratification shall have been proclaimed as hereinafter provided.

"22. The principal chief, as soon as practicable after the ratification of this agreement by Congress, shall call an extra session of the Creek Nation council and submit this agreement, as ratified by Congress, to such council for its consideration, and if the agreement be ratified the principal chief shall transmit to the President of the United States a certified copy of the act of the council ratifying the agreement, and thereupon the President shall issue his proclamation making public announcement of such ratification; thenceforward all the provisions of this agreement shall have the force and effect of law."

It appears from the correspondence accompanying your first letter that it has been contended by many parties in the Indian Territory dealing in Indian lands that the restrictive period provided for in paragraph 16 of this agreement expires on June 30, 1907, that being five years from the date of the approval of the act of Congress ratifying that agreement.

This contention seems to me wholly without merit. It is manifest that the parties to the agreement, when they spoke of the approval of the agreement, meant the approval of the agreement and not the approval of the act of Congress ratifying the agreement. On that date the agreement was approved by one party only.

The only doubt, I think, is as to whether July 26, 1902,

the date of the ratification of the agreement by the Creek Council, or August 8, 1902, the date of the proclamation by the President of the fact of ratification, should be held to be the date from which the restrictive period began to run. On the former date the agreement had undoubtedy been approved by both parties, but is was not until the latter date that, according to its express terms, the agreement became binding and effective. As it seems to me unreasonable and illogical to suppose that the parties to the agreement intended that the restrictive period should begin to run before the agreement became binding and effective, I am constrained to hold that such period began to run from August 8, 1902, and will expire August 8, 1907.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE INTERIOR.

NAVY—DISCHARGE—REENLISTMENT—CONTINUOUS SERVICE.

An enlisted man in the Navy who was appointed as mate and continued to serve as such after the expiration of his term of enlistment, without receiving a discharge, is still in the service and entitled to his discharge, and may be permitted to reenlist with the benefit of continuous service under article 839 of the Navy Regulations of 1905.

DEPARTMENT OF JUSTICE,

July 22, 1907.

SIR: In your note of July 16, 1907, you ask my opinion, in substance, whether one who enlisted for service in the Navy for a period of four years, and was appointed as mate and continued to serve as such after the expiration of his term of enlistment without receiving any discharge, may now have his appointment as mate revoked and be permitted to reenlist, with the benefit of continuous service under article 839, Navy Regulations. Specifically, your question refers to Richard J. Keating, who is one of several who are in that situation in the Navy.

Article 861 (1) of the Navy Regulations provides that:

"An enlisted man rated as mate or appointed a warrant officer is not thereby discharged from his enlistment."

The contract of an enlisted man is a contract to serve the Government in that capacity for the period specified. As far as concerns any question here, it differs in no respect from a contract by one individual to serve another during a specified period. In either case, if the man continues to perform the service until the end of the period specified, and if the other party has also performed, the contract is at an end.

In this case, at the expiration of Keating's term of enlistment his contract was performed and was no longer a bar to his discharge by the Government. He could not require the Government to retain him in the service nor would the Government ordinarily compel him to remain. I need not refer in this opinion to those special circumstances, such as absence from the United States, etc., which might exceptionally affect this general statement. But in this case, as in a case of a contract between individuals, if neither party desires to terminate the service, but it continues without any express contract, it will be held to be a continuance of the service upon the same terms as before, but not for any definite period. If this were not so then these men, serving beyond their terms of enlistment, would not be legally in the service, nor would there be any warrant for paying them for the service rendered.

Strictly, this man Keating and the others should have been given their discharges at the expiration of their enlistments. That this was not done was due to the Government, which is estopped to say that these men are not in the service as before. Being in the service and their terms of enlistment having expired, they are, of course, entitled to be discharged, and as Mate Keating has rendered the continuous service mentioned in article 839, section 16 of the Navy Regulations, your question is answered in the affirmative.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE NAVY.

SUBMARINE AND SUBSURFACE BOATS—CONSTRUCTION, PURCHASE.

The Secretary of the Navy is authorized to expend a part of the moneys appropriated by the acts of June 29, 1906 (34 Stat., 583), and March 2, 1907 (34 Stat., 1204), for the construction or purchase of one or more submarine boats of the *Lake* type, provided he shall be satisfied that the boat or boats in question when completed will be at least equal in value for purposes of naval warfare to the *Octopus*, or whatever other boat may have been in his judgment, on March 2, 1907, the best boat of the submarine class owned by or under contract for the Government.

The words "any boat that does not in such test prove to be" equal to the best boat now owned by the United States, in the act of March 2, 1907 (34 Stat., 1204), must be understood as meaning "any boat that is not shown by the result of such tests likely to be."

The word "equal," in the same provision, must be understood as meaning "at least equal" or "not inferior;" and the words "in value for naval purposes," or equivalent language, must be read into the passage after the word "equal."

The comparison involved in the provision is not one between the boats competing in the tests, nor between the types of boats thereby described, but between a boat to be constructed and the best boat of the same class now owned or contracted for by the Government.

Upon the hypothesis, as the papers submitted tend to show, that the United States did not own on March 2, 1907, and had not contracted for, any boat of the subsurface type, *Held*, that the provisions of the act of 1907, above referred to, have no application to boats of the subsurface type, and the Secretary of the Navy is authorized, in his discretion, to expend a portion of the appropriation therein made for the purchase of subsurface boats of the type submitted to trial.

DEPARTMENT OF JUSTICE,
July 30, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of July 8, 1907, in which you ask the following questions:

"1. Whether, upon the condition of facts thus presented, the Department is authorized to expend any portion of the moneys appropriated by the acts of June 29, 1906 (34 Stat., 583), and March 2, 1907 (34 Stat., 1204), for the

construction or purchase of a submarine boat or boats of the *Lake* type?

"2. Whether, under the facts as stated, the Secretary of the Navy is authorized to expend any portion of the appropriations referred to for the purchase of subsurface boats of the type subjected to trial as above set forth?"

"The conditions of facts thus presented" and the "facts, as stated," appear from your letter to be as follows:

The act making appropriations for the naval service for the fiscal year ending June 30, 1907 (34 Stat., 583), contains the following provisions:

"The Secretary of the Navy is hereby authorized, in his discretion, to contract for or purchase subsurface or submarine torpedo boats, to an amount not exceeding one million dollars, after such tests as he shall see fit to prescribe, to determine the comparative efficiency of the different boats for which bids may be submitted: *Provided*, That such tests shall take place within nine months from the date of the passage of this act; and for such purpose the sum of five hundred thousand dollars is hereby appropriated."

The act above quoted was supplemented by the following legislation, contained in the act making appropriations for the naval service for the fiscal year ending June 30, 1908, approved March 2, 1907 (34 Stat., 1204):

"That the provision in the Naval Appropriation Act, approved June twenty-ninth, nineteen hundred and six, authorizing the Secretary of the Navy to contract for subsurface or submarine boats after certain tests to be completed by March twenty-ninth, nineteen hundred and seven, is hereby amended, in accordance with the recommendation of the Secretary of the Navy, so as to extend the test period until May twenty-ninth, nineteen hundred and seven; and the limit of cost provided for in the authorization aforesaid is hereby increased to three million dollars, and the sum of one million dollars, which includes the half million dollars heretofore appropriated, is hereby appropriated, and to remain available until expended, no part of this appropriation to be expended for any boat that does

not in such test prove to be equal in the judgment of the Secretary of the Navy to the best boat now owned by the United States or under contract therefor, and no penalties under this limitation shall be imposed by reason of any delay in the delivery of said boat due to the submission or participation in the comparative trials aforesaid."

In pursuance of the provisions of these enactments the Navy Department appointed a Board for the purpose of testing and reporting upon submarine and subsurface boats, and this Board, after conducting trials of the *Octopus*, a submarine boat built by the Electric Boat Company under contract with the United States; of the *Lake*, a boat offered by the Lake Torpedo Boat Company, and a boat submitted by the Subsurface Torpedo Boat Company; submitted, April 30, 1907, a report from which the following quotations are taken:

"OPINION.

"It is the unanimous opinion of this Board that the *Octopus* is the superior boat presented for tests; and furthermore that she is equal to the best boat now owned by the United States and under contract.

"The Board is also of the opinion that a boat generally similar to the *Octopus*, but larger, would be a superior naval weapon.

"SUBSURFACE BOAT.

"The subsurface boat can not be compared with submarine boats, being of an entirely different type, but could be considered in the class of torpedo boats or destroyers if built of sufficient size—yet, in the absence of a regular subsurface boat, there being but a quarter-size model, it was impossible to make a satisfactory comparison with any class of vessels. From what the Board observed of the speed and maneuvering abilities of the model, there is no reason to doubt that guarantees made in these respects can be carried out.

"It may also be conceded that a subsurface boat, as compared to a torpedo boat, has less vulnerability, requires less men, and has a larger steaming radius, but she has less speed and greater draft."

Subsequently you addressed to the Board instructions to reply to the following two questions:

"1. Do the trials conducted by the Board show that the type of submarine boats represented by the *Lake* is superior, inferior, or equal to the type represented by the *Octopus?* Specify in what respects.

"2. With respect to the subsurface boat, and in view of the finding of the Board that such boats 'can not be compared with submarine boats, being of an entirely different type,' an expression of the Board's opinion, as deduced from the tests conducted during the trials, is also desired as to whether or not it was developed by such tests that boats of the subsurface type would, as a means of offensive or defensive warfare, be superior, equal, or inferior to the best torpedo boats now owned or contracted for by the Government, provided such boats were built of a size suitable to render their qualities available?"

The Board answered these questions as follows:

"1. That the type of submarine boat as represented by the *Lake* is, in the opinion of the Board, inferior to the type as represented by the *Octopus*.

"2. The closed superstructure of the *Lake*, with the large, flat deck, which is fitted to carry water ballast and to contain fuel tanks and air flasks, which is an essential feature of the *Lake* boat presented to us for trial, is inferior to the arrangements on board the *Octopus* for the same purposes, and also is, in the opinion of the Board, detrimental to the proper control of the boat.

"3. The hydroplanes, also an essential feature of the *Lake* boat presented to us for trial, were incapable of submerging the boat on an even keel. They are therefore regarded as an objectionable incumbrance.

"4. The Board is of the opinion that the tests of the subsurface boat model did not develop that boats of this type, built of a size suitable to render their qualities available, are equal to the best torpedo boat now owned by the Government."

It appears that Capt. Adolph Marix, U. S. Navy, president of the Board, did not concur in the fourth of the above

findings and submitted a separate report on the subject; but this fact does not seem to be material.

I am informed by your letter of July 8, above mentioned, that you have approved the reports of the Board (meaning, as I assume, the report of the majority of the Board with respect to the matter as to which the said reports were not unanimous) and have adopted their conclusions.

Answers to both of your questions depend upon the construction of the following passage in the act approved March 2, 1907:

"* * * No part of this appropriation to be expended for any boat that does not in such test prove to be equal in the judgment of the Secretary of the Navy to the best boat now owned by the United States or under contract therefor."

It is obvious that this provision is somewhat carelessly worded and can not be taken in its literal sense, for two reasons. In the first place, the appropriation in question is not to be expended for the purchase of any boat taking part in the test to which this passage refers, but for the construction of boats more or less similar to those tested, so that the words "any boat that does not in such test prove to be" must evidently be understood as meaning "any boat that is not shown by the result of such tests likely to be."

Secondly, since it is plain that the Congress could not have meant to prohibit the construction of a boat *superior* to any now owned by the United States, the word "equal" must be understood as meaning "at least equal" or "not inferior" and, moreover, since it would be unreasonable to interpret this "equality" as referring to size, cost, or other particulars inconsistent with the evident general meaning of the provision, the words "in value for naval purposes" or equivalent language must be read into the passage after the word "equal" in order to give the provision a rational and consistent construction.

I have been favored with written or printed arguments by counsel for all the construction companies affected to aid in the determination of the questions submitted in your letter and it is proper to say that the counsel for one of

these companies has argued, in substance, that the provision in question is insensible or repugnant in its terms and that for this reason the passage should be wholly disregarded.

I am unable to assent to this argument. I think the passage can be given a rational and effective construction in accordance with the canons of statutory interpretation by reading it, as above suggested, as equivalent in meaning to "no part of this appropriation to be expended for any boat that is not shown by the results of such tests likely to be at least equal in value for naval purposes, in the judgment of the Secretary of the Navy, to the best boat now owned by the United States or under contract therefor."

A further qualification of the language used is necessary to give effect to what I consider the evident meaning of the Congress, by the insertion before the word "boat" of the words "submarine or subsurface." This appears to have been virtually assumed by the Board in its report, but, as is hereinafter pointed out, there is room for doubt whether the Board gave full effect, in its reply to your second question, to this, in my judgment, necessary assumption.

For the sake of clearness, it may be well to point out that the comparison involved in the provision under discussion is not one between the boats competing in the prescribed tests, nor yet between the types of boats thereby represented, but between a boat to be constructed by one or the other of the competing construction companies and the best boat of the same class now owned or contracted for by the Government. To give a clear illustration of my meaning: If we suppose the *Octopus* to be the best boat of the submarine class owned by the Government or under contract on March 2, 1907, then the comparison for the purpose of this provision is to be made between the *Octopus* and such an improved boat of, say, the *Lake* type, as the Secretary of the Navy may believe the Lake Torpedo Boat Company can construct in accordance with the specifications of its bid. It is not at all decisive of this question that the type of the *Octopus* may be, in the judgment of the Secretary of the Navy, superior to that of the *Lake*,

for it is possible that, notwithstanding this inferiority of type, an individual boat of the *Lake* type might be constructed equal or even superior to the *Octopus*. The inferiority of the *Lake* type is, of course, a relevant circumstance to be considered by the Secretary in determining whether the Lake Torpedo Boat Company can make a vessel of their type which shall be worth as much as or more than the *Octopus* for naval purposes, but if he shall find that an enlarged and otherwise improved boat of the *Lake* type might be built which would equal or exceed in value for naval purposes the best existing boat of the *Octopus* type, his discretion is freed from the operation of this provision.

If the Congress had meant that all the boats to be paid for out of the appropriation in question should be of the type shown to be the best by the results of the tests prescribed, there would have been no difficulty in using appropriate language to express this meaning. What the Congress has said is that the best boat now owned or contracted for by the Government shall constitute a minimum of naval efficiency which must be found in any future vessel to be paid for out of this appropriation.

That such was the meaning of the Congress would be strongly suggested by a consideration of notorious facts in the contemporary history of naval construction. It is well known that certain nations have constructed large numbers of submarine vessels, and that a certain class of critics have strongly urged the hasty construction of many vessels of the same class by the United States. It is also notorious that some authorities in naval matters question seriously the practical value of vessels of this class, and advise that they be built at present in comparatively small numbers, and that existing types of submarine boats be regarded as, for the present, largely experimental. The provision in question evidently imposes a restriction on the discretion of the Secretary of the Navy, and, as it must be assumed that the Congress expects that official always to act in accordance with his own best judgment of the public needs, it seems reasonable to believe that the Congress meant by this provision to indorse the second, rather than the first,

of the two above-mentioned theories, by fixing a minimum of efficiency for naval purposes to be possessed by any vessel of the class which should be built out of the appropriation provided, so that the Secretary might not be led, by considerations of economy or rapidity of construction, to add to the Navy vessels of less value for purpose of naval warfare than should be possessed by the submarine boat selected as the minimum standard of merit. In other words, the Congress, by this provision, has said to the Secretary of the Navy: "You must not build, out of this appropriation, any boat for which, in your judgment, it would not be to the interest of the Government to pay as much as for the best boat of the same class which you now have, or are soon to have, in the Navy."

While it must be owned that the language of this provision is in some measure obscure, and that its construction is not wholly free from difficulty, I think the foregoing considerations establish its meaning with sufficient certainty to justify Executive action in conformity to the sense indicated.

It follows from what has been above said that, while the first three findings of the Board which have met your approval embody facts suitable for your consideration in determining, as a matter of discretion, whether you will or will not expend any part of the moneys appropriated by the acts mentioned in your first question to me for the construction or purchase of a submarine boat or boats of the *Lake* type, they are, nevertheless, not decisive of this question, and you are authorized, in my opinion, to expend some part of the said moneys for the construction or purchase of one or more boats of the type mentioned, provided you shall be satisfied that the boat or each of the boats in question, when completed in accordance with the terms of contracts to be made by you with the builders of the same, shall be, at least, equal in value, for purposes of naval warfare, to the *Octopus*, or whatever other boat may have been, in your judgment, on March 2, 1907, the best boat of the submarine class owned by or under contract for the Government.

With respect to your second question, I do not find, in

the papers accompanying your letter, anything to show that the United States owned, or had under contract for delivery, on March 2, 1907, any subsurface boat or boat of the same class with the subsurface boat of the type subjected to trial as set forth in the said accompanying papers. It is true that the Board has found, and you have approved its finding, that the subsurface boat "could be considered in the class of torpedo boats or destroyers, if built of sufficient size," but this finding does not seem to me to establish that a subsurface boat can be fairly considered either a "torpedo boat" or a "destroyer" within the meaning of the act of Congress providing for comparison with "the best boat now owned by the United States or under contract therefor." One very obvious reason sustaining this view of the matter is that the Board refers to two distinct classes of vessels in this comparison. If this section of the appropriation act had provided for the construction of "torpedo boats," and had contained a proviso in the same language as that which we have been considering, it seems evident that "the best boat now owned by the United States" would be understood as meaning the best torpedo *boat* and not the best *destroyer*, and, since the Board, in its finding, has grouped subsurface boats with *both* torpedo boats and destroyers, it would seem that it has had in view rather the end to be attained by the military engine in question, and the general method of attaining that end, than the specific means adopted in the case of each type so to effectually utilize such method as to attain the desired end.

In my opinion, the papers submitted with your letter tend to show that the United States, on March 2, 1907, did not own and had not contracted for any boat of the subsurface class, although the facts in this respect are not stated with sufficient definiteness to enable me to assume them as a basis for an opinion. Upon the hypothesis, however, that no vessel of this class was either owned by the Government or under contract at the date of the approval of the bill in question, it is my opinion that the provision contained in the section of the appropriation act to which you have called my attention has no application to

boats of this class, and therefore that upon the said hypothesis you would be authorized, in your discretion, to expend some portion of the appropriation referred to for the purchase of subsurface boats of the type submitted to trial as above set forth.

I think it appropriate to say, in conclusion, that the discretion conferred upon the Secretary of the Navy by the act making appropriations for the naval service for the fiscal year ending June 30, 1907 (34 Stat., 583), which was, in this respect, reenacted by the act approved March 2, 1907 34 Stat., 1204), with regard to the purchase or construction of vessels of these two classes, is a very wide discretion; and it would, in my judgment, defeat the general purpose of the Congress to place upon the provision above discussed such a construction as would relieve him of the responsibility which the Congress, in my opinion, plainly intended to impose upon him as to the expenditure of this portion of the appropriation.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE NAVY.

EASTERN CHEROKEE FUND—DEPOSIT OF IN BANKING INSTITUTIONS.

The Secretary of the Treasury is not authorized by virtue of the order of the Court of Claims in cause No. 23214, *The Eastern Cherokees* v. *The United States*, to deposit in Government depositories or other banking institutions the sum of $4,000,000 appropriated by the act of June 30, 1906 (34 Stat., 664), in favor of said Eastern Cherokees, in order that interest may be obtained thereon.

The order referred to was not an order for transfer within the meaning of section 3639 Revised Statutes, but merely a request or authorization, and does not abrogate the prohibitions and penalties imposed by law upon such transfer.

DEPARTMENT OF JUSTICE,
August 7, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of the 11th ultimo, in which you inclose a certified copy of an order made by the Court of Claims in cause No.

23214 of *The Eastern Cherokees* v. *The United States*, and request an expression of my opinion as to what action, if any, the Treasury Department may be justified in taking in pursuance thereof.

The order is as follows:

"This cause coming on to be further considered, upon the report of Special Commissioner Guion Miller of May 9, 1907, it is this 13th day of May, 1907, ordered that the Secretary of the Treasury be, and he is hereby, authorized and requested to deposit, out of the fund arising from the decrees of this court of May 18, 1905, and May 28, 1906, in favor of the Eastern Cherokees, for which appropriation was made in the general deficiency act of June 30, 1906, the sum of four million ($4,000,000) dollars with such duly recognized Government depositories or other banking institutions as shall be approved by him, which shall furnish good and sufficient securities (such as are required in the case of Government deposits) for the return of such deposit or deposits; provided such depositories shall undertake and agree to pay interest at the rate of not less than two per centum per annum for the use of said money so deposited.

"It is further ordered that the Secretary of the Treasury be, and he is hereby, authorized to make such deposits for the period of one year certain, or until the further order of the court, subject, however, to be demanded at any time after the expiration of one year aforesaid; provided, however, that the interest shall be paid annually to the Secretary of the Treasury, and shall be placed by him to the credit of the Eastern Cherokees entitled to participate in the fund appropriated by said act of June 30, 1906, above-referred to under the decrees and orders of this court heretofore entered in this cause."

The proceedings upon which this order is based are as follows:

On March 20, 1905, the Court of Claims rendered an opinion in three consolidated causes which had been instituted under the acts of July 1, 1902, and March 3, 1903 (32 Stat., 726, 996), conferring jurisdiction upon it to adjudicate treaty claims of the Cherokee tribe or of the

Eastern Cherokees or other band thereof, in which it was held that the Cherokee Nation was entitled to recover of the United States four items, aggregating $1,134,248.23, with interest, the principal item, $1,111,284.70, being for moneys which were applied to the expense of moving the Eastern Cherokees to the Indian Territory under the treaty of 1835, instead of being divided among them, but that as the Cherokee Nation as a government would soon cease to exist the Secretary of the Interior should be authorized to form rolls of the Cherokees, and this last-mentioned sum, with interest, until he should be ready to make payment, should be paid, less counsel fees and expenses, directly to the individuals entitled to share in the recovery. (*The Cherokee Nation* v. *The United States*, 40 Ct. Cls., 252, 328, 331.)

On May 18, 1905, a decree was entered adjudging that the Cherokee Nation have and recover of the United States said four items, with interest, the proceeds thereof "to be paid and distributed as follows," namely: Of the three small items one was to be paid direct to the Cherokee Nation and the other two to the Secretary of the Interior to be credited on certain Cherokee funds; and out of the principal item, namely, "$1,111,284.70, with interest thereon from June 12, 1838, to date of payment," the counsel fees and expenses chargeable by contract or allowed by the court should be paid by the Secretary of the Treasury to the persons entitled, and the balance should be paid to the Secretary of the Interior, who, after first paying the costs and expenses incident to the distribution, should distribute the remainder directly to the Eastern and Western Cherokees entitled, as individuals, or to their legal representatives. (40 Ct. Cls., 363.)

On appeal this decree was modified by the Supreme Court on April 30, 1906, so as to specifically limit the distribution to the Eastern Cherokees entitled, as individuals, and otherwise in all things affirmed. (*United States* v. *Cherokee Nation*, 202 U. S., 101, 130.)

On May 28, 1906, a decree was entered in the Court of Claims modifying the original decree of May 18, 1905, in accordance with the mandate of the Supreme Court, and

ordering that the Secretary of the Interior cause to be prepared a roll of those entitled to share in the distribution.

On June 30, 1906, in the general deficiency act, Congress made the appropriation which is referred to in the order of the Court of Claims, and which is, literally, an appropriation to pay the original judgment of May 18, 1905, without reference to either of the subsequent decrees. This act appropriates, "out of any money in the Treasury not otherwise appropriated," a sum as follows:

"To pay the judgment rendered by the Court of Claims on May eighteenth, nineteen hundred and five, in consolidated causes numbered twenty-three thousand one hundred and ninety-nine, The Cherokee Nation *versus* The United States; numbered twenty-three thousand two hundred and fourteen, The Eastern Cherokees *versus* The United States, and numbered twenty-three thousand two hundred and twelve, The Eastern and Emigrant Cherokees *versus* The United States, aggregating a principal sum of one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, as therein set forth, with interest upon the several items of judgment at five per centum, one million one hundred and thirty-four thousand two hundred and forty-eight dollars and twenty-three cents, together with such additional sum as may be necessary to pay interest, as authorized by law." (34 Stat., 634, 664.)

Meanwhile, the Secretary of the Interior having appointed a special agent to make up the roll provided for in the decree of the court, but great difficulties having arisen, owing chiefly to a number of undetermined legal questions, on February 20, 1907, transmitted certain questions to the Court of Claims for its opinion, under the provision of section 2 of the Bowman Act (22 Stat., 485), and thereafter, on April 10, 1907, addressed a letter to the court requesting that the enrollment of the Eastern Cherokees and the distribution of the fund should be made under the direct supervision and authority of the court. A petition to this effect was also filed by certain claimants.

Accordingly, on April 29, 1907, the Court of Claims vacated so much of the decree of May 18, 1906, as provided

that the Secretary of the Interior should cause the roll to be prepared and distribute the fund, and appointed the former special agent as special commissioner of the court to prepare the roll.

On May 9, 1907, the special commissioner filed a report stating that the Comptroller of the Treasury had decided that under the appropriation of June 30, 1906, the original sum of $1,111,284.70 bore interest to May 14, 1906, the date of the mandate of affirmance by the Supreme Court, making a total, principal and interest, of $4,937,036.16, but that interest ceased from that date (26 Stat., 537); that after deducting attorneys' fees and expenses of enrollment already disbursed there was left about $4,040,000 standing to the credit of the fund in the Treasury Department; that it would probably take about two years to make up and approve the rolls (it being estimated that there will be about 65,000 individual claimants), and it was of vital importance to the Indians that interest should, in the meantime, be obtained on the fund, and therefore recommending, in view of the court's original intention that the recovery should bear interest until distributed, that the Secretary of the Treasury be requested and authorized to deposit at interest, under certain conditions, $4,000,000 of the amount standing to the credit of the Eastern Cherokees.

Thereupon, on consideration of this report, the Court of Claims, on May 13, 1907, entered the order, a copy of which is inclosed in your letter.

Under the foregoing state of facts, after careful consideration of the question submitted, I concur in the opinion expressed by the Acting Solicitor of the Treasury that you would not be authorized to make the deposit of $4,000,000 in Government depositories or other banking institutions in accordance with the request contained in the order of the Court of Claims.

1. It is clear that, independently of this order, the making of such deposit is forbidden by the Revised Statutes.

Section 3639 provides that "the Treasurer of the United States, * * * and all public officers of whatsoever character, are required to keep safely, without loaning, using, *depositing in banks*, or exchanging for other funds than as

specially allowed by law, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper Department or officer of the Government, to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed * * *."

Section 5490 provides that "every officer or other person charged by any act of Congress with the safekeeping of the public moneys, who fails to safely keep the same, without loaning, using, converting to his own use, *depositing in banks*, or exchanging for other funds than as specially allowed by law, shall be guilty of embezzlement" of such moneys and punished by imprisonment and fine.

Section 3651 provides that "no exchange of funds shall be made by any disbursing officer or agent of the Government * * * other than an exchange for gold, silver, United States notes, and national-bank notes; and every such disbursing officer, when the means for his disbursements are furnished to him in gold, silver, United States notes, or national-bank notes, shall make his payments in the moneys so furnished," and that the head of the proper Department shall immediately suspend any disbursing officer or agent violating these provisions and report such violations to the President, who may thereupon promptly remove him from office.

It was said by Attorney-General Devens that the second clause of this section treats every disbursing officer or agent of the Government "not as a debtor to the United States, but as a bailor of the funds of the United States, who is required to pay them out, and necessarily to keep them in the precise form in which he receives them," and that the Treasurer and assistant treasurers of the United States are prohibited from even exchanging gold and silver coin for United States notes. (16 Op., 381.)

Furthermore, while the Secretary of the Treasury is authorized by section 3640 of the Revised Statutes to transfer the moneys in the hands of any public depository to the Treasury of the United States, and to transfer them from one depository to another, as their safety and the convenience of the public shall require, there is no provision

whatever authorizing him to transfer moneys from the Treasury to a public depository for any purpose whatsoever.

It is manifest that under these several provisions of the Revised Statutes the deposit by the Treasurer of $4,000,000 of the public moneys in a public depository or other banking institution, in order that interest may be obtained thereon, would be forbidden by law, unless the order of the Court of Claims is such an order for the transfer of public moneys "by the proper Department or officer of the Government," within the meaning of section 3639, as would authorize such transfer to be made.

2. Without discussing the question as to whether, if the court had directed you to make the transfer by a specific order to that effect, this would have been, under all the circumstances and in view of the appropriation of June 30, 1906, an order from the proper Department or officer of the Government, within the meaning of section 3639, it is sufficient to say that the court has not in fact given you such direction or order, but that the "order" in question merely requests and authorizes you to make the transfer without in any manner directing that it be done.

It is clear to my mind that such a request is not an order for the transfer within the meaning of the statute, and does not abrogate the prohibitions and penalties imposed by law upon such transfer.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

LEAVE OF ABSENCE—MEMBERS OF THE GRAND ARMY OF THE REPUBLIC.

The President is without authority to grant an extension of leave of absence with pay to members of the Grand Army of the Republic employed in the Government service who attend the annual encampment of that order.

DEPARTMENT OF JUSTICE,
August 15, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of July 20, asking for my opinion as to whether you

may legally comply with the request of the secretary of the Grand Army of the Republic for an Executive order directing that members of that organization in the Government employ be given leave of absence with pay to attend the annual encampment of the order.

In reply, I am constrained to say that I am unable to find that any such authority has been given you. Provision has from time to time been made by Congress for leaves of absence to various classes of Government officers and employees. (U. S. Comp. Stat., 1901, vol. 1, p. 82.)

It does not, however, appear that you have anywhere been authorized to extend these vacation periods, nor does it appear that in this particular veterans of the civil war are entitled to any preference.

Very respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

DIAMOND SHOAL LIGHT-HOUSE—COMMENCEMENT OF CONSTRUCTION.

Under the facts stated, there has been no such "commencement of construction," in good faith or otherwise, by Albert F. Eells, who was authorized under the act of March 3, 1905 (33 Stat., 1266), to construct, on conditions specified, a light-house and signal station upon the outer Diamond Shoal at Cape Hatteras, North Carolina, as was contemplated by that act, but only some preparation therefor.

The term "construction," as used in that act, means an actual putting together of the parts of the light-house in their proper place and order, with regard to each other, if not necessarily upon the site to be occupied.

By the expression "commencement in good faith," the beginning of a continuous operation of construction was intended, rather than the making of a first move followed by an immediate cessation of work and with no apparent readiness to proceed further.

DEPARTMENT OF JUSTICE,
August 16, 1907.

SIR: I have received your communication calling attention to the act of March 3, 1905 (33 Stat., 1266), authorizing Albert F. Eells, of Boston, Mass., and such others as might be associated with him, "to construct, in the manner

and on the conditions specified," a light-house and fog signal upon the outer Diamond Shoal at Cape Hatteras, on the coast of North Carolina, which provides that—

"The said Eells and his associates shall, within six months from the date of the approval of this act, file with the Secretary of Commerce and Labor (a) an agreement in writing accepting all the provisions of this act; and (b) detailed drawings and specifications of the structure in all its parts for the approval of said Secretary."

And that—

"Unless said plans are approved by said Secretary prior to January first, nineteen hundred and six, and the construction of the proposed structure be in good faith commenced within six months after such approval, the authority granted by this act shall cease."

You state that the period of six months mentioned expired June 29, 1906, and that—

"Prior to the expiration of this period the sole work of actual physical construction consisted in the construction at Boston of one steel girder, at a cost of $400, by the Boston Bridge Works, under a contract dated May 25, 1906, with the Maine Coast Granite Company, a corporation formed by Eells and his associates. This girder is one of twenty-four similar ones to go in the caisson, designed to serve as the base of the structure. The order for the girder was placed with the works May 28, 1906, and it was completed June 19, 1906. No other work of actual physical construction has been done before or since. No work has been done at the site of the light-house, nor has the site been designated, nor was a request made to designate the site prior to June 29, 1906; not, in fact, until January 17, 1907. The Maine Coast Granite Company has, however, acquired some real estate at South Brooksville, Me., on which a granite quarry is situated, with some of the granite quarried and ready for shipment, to be used ultimately for the concrete to go in the interior of the caisson and for the riprap apron to be deposited after the placing of the caisson to protect the shoal. This property was conveyed to the company by Albert F. Eells, December 3, 1901, several years before the passage of the act, and it does not appear that any quarrying was done thereon since its

acquisition. Moreover, since the rejection of the original drawings and specifications and their subsequent conditional approval, and prior to June 29, 1906, E. S. Shaw, engineer, on behalf of Eells and his associates, states that he has made 'studies' of a design for the superstructure, with a view to meeting the requirements of the Light-House Board in connection with the matter of eliminating the central stairway shaft, storing lifeboats in the interior, and providing the stairway shaft with fireproof doors, and that he has also prepared detailed drawings for the twenty-four girders and three different drawings of the contours of Diamond Shoal. These are the only steps at any time taken by Eells and his associates even remotely bearing on the work of actual construction, apart from the organization of the Maine Coast Granite Company, the assignment to the company of the Eells patent and franchise under the act, the projected organization of the Cape Hatteras Construction and Navigation Company, various efforts to finance the enterprise, sundry conferences, discussions, and consultations, and some preliminary negotiations with contractors from whom estimates or bids were obtained for the construction of the caisson."

By the act of Congress above mentioned you are authorized, "within sixty days after written request therefor from the said Eells and his associates," to designate a suitable place for the site of the light-house, and, "at any time after January 1, 1907," to determine within what period thereafter the structure must be ready for the installation of the light and other equipment.

You say that Eells and his associates now request action by you under this authority, and, therefore, you request my opinion upon the question whether, under the circumstances, there has been a "commencement in good faith of the construction of the proposed structure within six months after the approval of the plans within the meaning of the act."

By the term "construction," as used in this statute, it seems to me that Congress intended an actual putting together of the parts of the light-house in their proper place and order with regard to each other, if not necessarily

upon the site to be occupied, and by "commencement in good faith" it seems to me that the beginning of a continuous operation of constructing was intended rather than the mere making of a first move followed by an immediate cessation of work and with no apparent readiness to proceed further.

Here, I think, there was "no commencement of construction" in good faith or otherwise, but only some preparation therefor. (*Kansas Mortgage Company* v. *Wyerhaeuser*, 29 Pac., 153; *Damon* v. *Granby*, 2 Pick., 345, 356; *Morse* v. *City Westport*, 19 S. W., 831; *Eishleay & Wilson*, 42 Wky. Notes Cas. (Pa.), 525, 527; *City Sewerage Utilization Co.* v. *Board of Health*, 1 Leg. Gaz. Rep., 402.)

I accordingly answer your question in the negative.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF COMMERCE AND LABOR.

SEMINOLE INDIANS — MODIFICATION OF AGREEMENT WITH.

Congress has plenary authority to control the affairs and administer the property of the Five Civilized Tribes in the Indian Territory and other Indian tribes.

The agreements between the United States and the Seminole Nation ratified by the acts of July 1, 1898 (30 Stat., 568), and of April 26, 1906 (34 Stat., 137), are not really treaties, and are of legal force and effect only because ratified by Congress.

Congress having power to abrogate a formal treaty with a sovereign nation, may alter or repeal an agreement with an Indian tribe.

Congress has power to enact legislation authorizing the delivery of Seminole land patents prior to the expiration of the Seminole government, and also by legislation to modify the terms of the Seminole agreement of July 1, 1898, with reference to the school fund of that nation, and authorize the Department of the Interior to assume control of the schools and the school fund.

The lands of the Seminole Nation having been granted to it merely in its corporate capacity as a nation, the United States Government may, as a condition of their allotment in severalty and the extinguishment of its own ultimate interest therein, impose the restrictions upon their alienation provided by section 19 of the act of April 26, 1906 (34 Stat., 137, 144).

The provisions of section 10 of the act of 1906 (34 Stat., 140) in regard to the control of the tribal schools and the lands and property pertaining thereto by the Secretary of the Interior, and the use of the tribal funds for the purpose of defraying the necessary expenses of such schools, is purely a governmental and administrative matter involving no taking of the property of the nation.

The purpose of Congress in sections 10 and 11 of the act of April 26, 1906 (34 Stat., 140), was to give the Secretary of the Interior exclusive control, within limitations stated, of the revenues of the Five Civilized Tribes, including the Seminole Nation.

The Secretary of the Treasury may safeguard all disbursements on behalf of the Seminole Nation now authorized and require that all Seminole warrants issued after January 1, 1907, shall be approved by the United States inspector for the Indian Territory and paid by the United States Indian agent, Union Agency, instead of being paid by the treasurer of the nation.

DEPARTMENT OF JUSTICE,
August 19, 1907.

SIR: In your letter of March 22 you submit certain questions raised by the Hon. John F. Brown, principal chief of the Seminole Nation, in regard to the constitutionality of the act of Congress of April 26, 1906 (34 Stat., 137), providing for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, in so far as it modifies or changes the provisions of the agreements in regard to the allotment, distribution, and administration of the property and funds of the Seminole Nation, which were negotiated with that nation by the Commission to the Five Civilized Tribes and ratified by the acts of Congress of July 1, 1898 (30 Stat., 567), and June 2, 1900 (31 Stat., 250). Certain other questions raised by Chief Brown as to the extent of your authority under said act are also presented. The several questions referred to are specifically stated by you as follows:

"1. Whether Congress has power to enact legislation authorizing the delivery of Seminole patents prior to the expiration of the Seminole tribal government.

"2. Whether Congress has authority to pass legislation modifying the terms of the Seminole agreement of July 1, 1898, with reference to the school fund of that nation and authorize the Department to assume control of the schools and the school fund.

"3. As to the constitutionality of the provisions of section 19 of the act of April 26, 1906 (34 Stat., 144), declaring that full-blood Indians can not alienate their lands for twenty-five years from the date of the approval of the act 'unless such restriction shall, prior to the expiration of said period, be removed by act of Congress.'

"4. Whether the Seminole trust or invested funds can be distributed in a manner not provided by the agreement of 1898 or be used for any purpose not mentioned therein.

"5. As to the power of the Department to direct that all Seminole warrants issued after January 1, 1907, shall be approved by the United States Indian inspector for the Indian Territory and paid by the United States Indian agent, Union Agency, instead of being paid by the treasurer of the Seminole Nation..

"6. Whether patents conveying allotments to Seminole citizens should be delivered before the tribal government is actually extinguished."

The agreement with the Seminole Nation ratified by the act of July 1, 1898, contained these provisions (30 Stat., 568):

"Five hundred thousand dollars ($500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of the children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country.

* * * * *

"When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said nation and the members thereof in and

to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and non-taxable as a homestead in perpetuity.

"All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided and reserving said sum of five hundred thousand dollars for school fund shall be paid per capita to the members of said tribe in three equal installments, the first to be made as soon as convenient after allotment and extinguishment of tribal government, and the others at one and two years, respectively. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements."

The agreement ratified by the act of June 2, 1900, contained certain provisions as to the rolls of members of the Seminole Nation and the descent of property which need not be considered.

The act of April 26, 1906, provided (34 Stat., 138–141):

"SEC. 6. That if the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States, or if any such executive become permanently disabled, the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability, or death of the incumbent, by appointment of a citizen by blood of the tribe.

"If any such executive shall fail, refuse, or neglect, for thirty days after notice that any instrument is ready for his signature, to appear at a place to be designated by the Secretary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded shall convey legal title, and such approval shall be conclusive evidence that such executive or chief refused or neglected after notice to execute such instrument.

"*Provided*, That the principal chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole government shall cease to exist.

* * * * *

"SEC. 10. That the Secretary of the Interior is hereby authorized and directed to assume control and direction of the schools in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, with the lands and all school property pertaining thereto, March fifth, nineteen hundred and six, and to conduct such schools under rules and regulations to be prescribed by him, retaining tribal educational officers, subject to dismissal by the Secretary of the Interior, and the present system so far as practicable, until such time as a public school system shall have been established under Territorial or State government, and proper provision made thereunder for the education of the Indian children of said tribes, and he is hereby authorized and directed to set aside a sufficient amount of any funds, invested or otherwise, in the Treasury of the United States, belonging to said tribes, including the royalties on coal and asphalt in the Choctaw and Chickasaw nations, to defray all the necessary expenses of said schools, using, however, only such portion of said funds of each tribe as may be requisite for the schools of that tribe, not exceeding in any one year for the respective tribes the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five; and he is further authorized and directed to use the remainder, if any, of the funds appropriated by the act of Congress approved March third, nineteen hundred and five, 'for the maintenance, strengthening, and enlarg-

ing of the tribal schools of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole nations,' unexpended March fourth, nineteen hundred and six, including such fees as have accrued or may hereafter accrue under the act of Congress approved February nineteenth, nineteen hundred and three, Statutes at Large, volume thirty-two, page eight hundred and forty-one, which fees are hereby appropriated, in continuing such schools as may have been established, and in establishing such new schools as he may direct, and any of the tribal funds so set aside remaining unexpended when a public school system under a future State or Territorial government has been established, shall be distributed per capita among the citizens of the nations in the same manner as other funds.

"SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. * * *

* * * * *

"SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior.

"SEC. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

"SEC. 29. That all acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby, repealed."

It is unnecessary to go into any detailed discussion of the power of Congress to alter, modify, or repeal the provisions of the agreement with the Seminole Nation ratified by the act of July 1, 1898, and otherwise provide for the administration of their property and funds, as provided by the act of April 26, 1906, because the question has been conclusively settled by the decisions of the Supreme Court. (*Stephens* v. *Cherokee Nation*, 174 U. S., 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S., 294; *Lone Wolf* v. *Hitchcock*, 187 U. S., 553; *Morris* v. *Hitchcock*, 194 U. S., 384, 388; *Wallace* v. *Adams*, 204 U. S., 415.)

These decisions maintain the plenary authority of Congress to control the affairs and administer the property of the Five Civilized Tribes in the Indian Territory and other Indian tribes.

In *Lone Wolf* v. *Hitchcock* the question involved was as to the authority of Congress to dispose of the tribal property of the Kiowa, Comanche, and Apache Indians in Oklahoma in a manner inconsistent with a treaty previously entered into with such Indians. In upholding the

legislation there in question the court said (187 U. S., 566):

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith toward the Indians."

It is to be observed that the agreements with the Seminole Nation herein referred to are not really treaties and are of legal force and effect only because ratified by act of Congress. Certainly if, as has been often adjudged, Congress may abrogate a formal treaty with a sovereign nation (*Chinese Exclusion case*, 130 U. S., 581; *Horner* v. *United States*, 143 U. S., 578; *Fong Yue Ting* v. *United States*, 149 U. S., 706; *La Abra Silver Mining Co.* v. *United States*, 175 U. S., 460), it may alter or repeal an agreement of this kind with an Indian tribe.

In *Lone Wolf* v. *Hitchcock* the court further said (187 U. S., 568):

"Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation* v. *Hitchcock* (187 U. S., 294), decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property."

In *Cherokee Nation* v. *Hitchcock* the court held that the act of Congress of June 28, 1898 (30 Stat., 495), which, among other things, gave the Secretary of the Interior exclusive power over oil, coal, asphalt, and other minerals in the Indian Territory and authorized him to make leases thereof under certain prescribed conditions, the royalties and rents to be paid into the Treasury of the United States to the credit of the tribe to which they belonged, was a valid exercise of power notwithstanding the provisions of

the treaties with the Cherokee Nation which, it was claimed, gave the Cherokees a fee simple title to their lands. In that case the court, after referring to its decision in *Stephens* v. *Cherokee Nation*, said (187 U. S., 307–308):

"The holding that Congress had power to provide a method for determining membership in the Five Civilized Tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe.

"Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. (*The Cherokee Trust Funds*, 117 U. S., 288, 308.) The manner in which this land is held is described in *Cherokee Nation* v. *Journeycake* (155 U. S., 196, 207), where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said: 'Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees or any of them.'

"There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

There is nothing to differentiate the case of the Seminoles from that of the Cherokees. As said with respect to the latter, whatever title the Seminoles have to their lands is in the tribe and not in the individuals. The treaty of March 21, 1866, article 3 (14 Stat., 755), under which they hold them, provided:

"The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter de-

scribed, which shall constitute the national domain of the Seminole Indians."

There is likewise no question here as to the taking of property. The act of April 26, 1906, merely makes somewhat different provisions in regard to the allotment of the lands and the collection and distribution of the revenues of the Seminole Nation than was provided for in the agreements with that nation, but the measures provided are all for the benefit and protection of the Seminole Nation and its members. It is merely a matter of administration whether patents shall be delivered before or after the dissolution of the tribal government. So, too, the restriction upon alienation in respect to full bloods is simply for the protection of those Indians. The lands of the Seminole Nation having been granted to it merely in its corporate capacity as a nation, necessarily the Government may, as a condition of their allotment in severalty and the extinguishment of its own ultimate interest therein, impose such restrictions upon their alienation as the condition of the members of said nation, or some of them, may in its judgment require. The power of the United States in this regard was recognized by the Supreme Court in the *Matter of Heff* (197 U. S., 488), where a restriction upon alienation was held not to be inconsistent with the citizenship of the allottee. The court there said (pp. 508–509):

"But it is said that the Government has provided that the Indians' title shall not be alienated or encumbered for twenty-five years, and has also stipulated that the grant of citizenship shall not deprive the Indian of his interest in tribal or other property, but these are mere property rights and do not affect the civil or political status of the allottees. In *United States* v. *Rickert* (188 U. S., 432) we sustained the right of the Government to protect the lands thus allotted and patented from any encumbrance of State taxation. Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted), *and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants.* This it may do by appropriate proceedings in either a national or a State court. But the fact that property is held subject to a condition against alienation

does not affect the civil or political status of the holder of the title. Many a tract of land is conveyed with conditions subsequent. * * * "

The provision of section 10 in regard to the control of the tribal schools and the lands and property pertaining thereto by the Secretary of the Interior, and the use of the tribal funds for the purpose of defraying the necessary expenses of such schools, is likewise a purely governmental and administrative matter and involves no taking of the property of the nation. In this connection it will be observed that the Secretary is authorized to use " only such portion of said funds of each tribe as may be requisite for the schools of that tribe, not exceeding in any one year for the respective tribes the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five."

The provision of section 11 as to the collection of the tribal revenues and the payment of claims against the tribes is also of the same character.

There remains to be considered only the question as to your authority " to direct that all Seminole warrants issued after January 1, 1907, shall be approved by the United States Indian inspector for the Indian Territory and paid by the United States Indian agent, Union Agency, instead of being paid by the treasurer of the nation."

The answer to this question depends upon the extent of your authority over the financial affairs of the Seminole Nation, under the act of April 26, 1906. By section 11 of that act all the revenues of whatever character accruing to the Seminole tribe, among others, whether before or after the dissolution of the tribal government, is directed to be collected by an officer appointed by you, and you are also directed to pay all lawful claims against the tribes mentioned which may have been contracted after July 1, 1902, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. In addition, as above noted, you are authorized to defray the expenses of the tribal schools out of the funds of said tribes in the Treasury of the United States.

In my judgment the purpose of Congress in these sections was to give you exclusive control, within the limitations stated, of the revenues of the Five Civilized Tribes, including the Seminole Nation. It certainly could not have been its purpose, after authorizing you to defray the expenses of the tribal schools and to pay all lawful claims contracted after July 1, 1902, or for which warrants had been regularly issued, to continue in the tribal government authority to make like or other disbursements, especially in view of the fact that it had turned the collection of all tribal revenues of whatever character over to an officer appointed by you. Being therefore empowered and directed to make all disbursements on behalf of the Seminole Nation that are now authorized, I have no doubt whatever that you may safeguard those disbursements by requiring that all Seminole warrants issued after January 1, 1907, shall be approved by the United States Indian inspector for the Indian Territory and paid by the United States Indian agent, Union Agency, instead of being paid by the treasurer of the nation.

Respectfully,

CHARLES J. BONAPARTE.

The DEPARTMENT OF THE INTERIOR.

CHEROKEE INDIAN LANDS—PERIODS OF ALIENATION.

All lands allotted to citizens of the Cherokee Nation, except homesteads, will be alienable under the act of July 1, 1902 (32 Stat., 716), in five years after issuance of patent.

The provision of the act of April 21, 1904 (33 Stat., 189, 204), authorizing the removal of restrictions upon the alienation of lands of all allottees of the Five Civilized Tribes, within limitations stated, and the original five-year restriction as to surplus lands and the twenty-one year restriction in the act of July 1, 1902 (32 Stat., 716), were superseded as to full bloods by section 19 of the act of April 26, 1906 (34 Stat., 137, 144), which forbids full bloods to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to them for the period of twenty-five years after the passage and approval of that act, unless the restrictions be removed by Congress prior to the period indicated.

DEPARTMENT OF JUSTICE,
August 20, 1907.

SIR: By your letter of August 6, 1907, you request my opinion upon the following questions arising in the administration of your Department of the laws relating to the alienation of Cherokee lands in the Indian Territory:

"1. Will citizens of the Cherokee Nation be lawfully entitled, under the act of July 1, 1902 (32 Stat., 716), to alienate lands allotted to them, except homesteads, after the expiration of five years from August 7, 1902; i. e., after the expiration of five years from the date of the ratification of said act, or will such lands be alienable in the case of each allottee in five years after the issuance of patent to him?

"2. To what extent, if any, is the right of alienation under said act of July 1, 1902, affected by the provisions of the act of April 21, 1904 (33 Stat., 189), relative to the removal of restrictions upon alienation from all citizens, and the act of April 26, 1906 (34 Stat., 137), relative to the alienation of lands allotted to full-blood Indians?"

The act of July 1, 1902 (32 Stat., 716), providing for the allotment of the lands of the Cherokee Nation, contains the following provisions:

"SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allotable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be non-taxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

"SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

"SEC. 15. All lands allotted to the members of said tribe,

except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent."

The Indian appropriation act of July 21, 1904 (33 Stat., 189, 204), provided:

"* * * And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal or restriction is for the best interest of said allottee."

The act of April 26, 1906 (34 Stat., 137, 144), providing for the final disposition of the affairs of the Five Civilized Tribes, provides:

"SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however*, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior: and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations. * * *"

1. In regard to your first inquiry, I think the clear and specific statements in section 15 of the act of July 1, 1902, that " all lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent," should be taken as making definite and certain the interpretation to be given the negative expression in the previous section that such lands should not, among other things " be alienated by the allottee or his heirs before the expiration of five years from the date of the ratification of this act." As the purpose of the five-year restriction upon alienation presumably was to keep the allottee in possession of his allotment for that length of time, so that he might acquire a knowledge of its value and uses and be better fitted to dispose of it, such purpose might be impaired and perhaps altogether defeated if the date from which the restrictive period was to commence were held to be that of the ratification of the act, as many members might not have received their allotments until long after the ratification of the act and in some cases not until after the expiration of five years from that time. It will be observed that by section 13 the time when homesteads were to become alienable was fixed at " not exceeding twenty-one years from the date of the certificate of allotment," upon the receipt of which certificate by section 21 of the act the allottee became entitled to be put in possession of his allotment.

This view, it will be observed, satisfies the well-settled rule " that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." (*Market Co.* v. *Hoffman*, 101 U. S., 116; Sedgwick on State and Const. Law, 238; Wilberforce's Statute Law, 111.)

2. Your second question is as to the effect of the provision of the act of April 21, 1904, in regard to the removal of restrictions upon alienation from all citizens and that of the act of April 26, 1906, relative to alienation by full bloods upon the right of alienation under the act of July 1, 1902.

The construction of the statutes referred to seems perfectly clear. By the act of April 21, 1904, all the restric-

tions upon the alienation of lands of all allottees of either of the Five Civilized Tribes who are not of Indian blood, except minors, are, except as to homesteads, removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors and except as to homesteads, are authorized to be removed upon certain conditions. The provision of this act authorizing the removal of restrictions, as well as the original five-year restriction as to surplus lands and the twenty-one year restriction as to homesteads, in the act of July 1, 1902, were, however, superseded as to full bloods by the provisions of section 19 of the act of April 26, 1906, which forbids full bloods to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to them for a period of twenty-five years from and after the passage and approval of that act, unless such restrictions shall, prior to the expiration of said period, be removed by act of Congress, with the proviso as to leasing.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE INTERIOR.

DRAWBACK—SIRUP MADE FROM SUGAR BROUGHT FROM THE PHILIPPINE ISLANDS.

Materials brought into the United States from the Philippine Islands on which duty has been paid under the Philippine revenue act of March 8, 1902 (32 Stat., 54), are to be regarded as "imported materials" within the meaning of the drawback provision (sec. 30) of the tariff act of July 24, 1897 (30 Stat., 211), although not brought in from a foreign country.

Drawback should be allowed under section 30 of the tariff act of July 24, 1897 (30 Stat., 211), upon the exportation to Europe of sirup manufactured from raw sugar which was brought into the United States from the Philippine Islands and upon which duties were paid under the Philippine revenue act of March 8, 1902 (32 Stat., 54).

Although most of the definitions of the words "import" and "export" refer to the taking of goods from one country to another, they being ordinarily the only cases in which import or export

duties are imposed, these words may be also used in reference to the taking of goods from one part of a country to another or from one State to another.

The word "imported," as used in section 30 of the tariff act of July 24, 1897, does not necessarily imply that the materials in which drawback is to be allowed must have come from a foreign country in a technical sense.

The general purpose of section 30 was to provide that whenever materials are brought into the United States under such circumstances that they are subject to the payment of duty and used here in the manufacture of finished articles, upon the subsequent exportation of such manufactured articles to a foreign country a drawback shall be allowed upon the material on which duty has been paid.

The spirit and letter of section 30 are broad enough to include materials brought into this country from the Philippine Islands and subjected to duty as coming from a territory which, though not a foreign country, has not been permanently incorporated into the United States, and has been temporarily treated by Congress as not within the United States for tariff purposes.

Under the special legislation relating to the temporary organization of the Philippine Islands, they are treated as territory remaining, as yet, outside of the United States, in a tariff sense, for the purpose of imposing duties on articles shipped from them "into" this country analogous to those imposed on imports from a foreign country, and having such status that the term "imports" can be properly applied to merchandise brought from them into the United States.

DEPARTMENT OF JUSTICE,
August 23, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of April 2, in which, in order to determine an application that has been made to your Department for the allowance of drawback on the exportation to Europe of sirup manufactured from raw sugar brought from the Philippine Islands, you request an expression of my opinion as to whether "drawback may be allowed on the exportation to countries other than the Philippines of articles manufactured in this country from materials brought from the Philippine Islands."

The following statutory provisions are material to the consideration of this question:

By the tariff act of July 24, 1897 (30 Stat., 151), which prescribes in section 1 rates of duty upon various "articles

imported from foreign countries," it is provided in section 30 "that where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties."

By the act of March 8, 1902, temporarily to provide revenue for the Philippine Islands (32 Stat., 54), it is provided that the tariff law enacted in 1901 by the United States Philippine Commission shall remain in full force and effect, and that there shall be levied "upon all articles coming into the Philippine Archipelago from the United States" the rates of duty required thereunder upon like articles imported from foreign countries into the archipelago (sec. 1); that "there shall be levied, collected, and paid upon all articles coming into the United States from the Philippine Archipelago seventy-five per centum of the rates of duty which are required to be levied, collected, and paid upon like articles imported from foreign countries," less any duties levied and paid upon their shipment from the archipelago (sec. 2); that said duties "shall be held as a separate fund and paid into the treasury of the Philippine Islands" (sec. 4); that all articles which may under existing laws and regulations be exported to a foreign country with benefit of drawback "may also be shipped to the Philippine Islands with like privilege," and "where materials on which duties have been paid have been used in the manufacture of articles manufactured or produced in the United States there shall be allowed on the shipment of said articles to the Philippine Archipelago a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties" (sec. 6); and that the provisions of the customs administrative act of June 10, 1890, and its amendment, "shall apply to all articles coming into the United States from the Philippine Archipelago" (sec. 8).

By the act of July 1, 1902, temporarily to provide for the administration of civil government in the Philippine Islands, it is provided, in section 84, that "all laws relating

to the collection and protection of customs duties" not inconsistent with the temporary revenue act of March 8, 1902, "shall apply in the case of * * * goods arriving from said Philippine Islands in the United States." (32 Stat., 691, 711.)

By the Philippine tariff revision law of March 3, 1905 (33 Stat., 928), prescribing rates of duty upon articles "imported into the Philippine Islands" and products of the islands "exported therefrom," it is provided that the rates levied upon products of the Philippine Islands coming into the United States shall be less "any export duty" levied upon their shipment from the Philippine Islands. (Secs. 2, 13.)

Upon consideration of these various statutes, I am of opinion that, while the Philippine revenue act of 1902 prescribing tariff duties on trade with the Philippine Islands does not in itself authorize the drawback now in question, since its provision in reference to the allowance of drawback on articles manufactured in this country from materials brought in from the Philippine Islands applies only where such articles are shipped back to the islands, nevertheless, as this act does not exclude such manufactured articles from any drawback privilege to which they may be otherwise entitled, the materials brought in from the Philippine Islands on which duty has been paid under the Philippine revenue act are to be regarded as "imported materials" within the meaning of section 30 of the tariff act of 1897, although not brought in from a foreign country, and therefore that, upon the subsequent exportation to a foreign country of the articles manufactured from such materials, drawback should be allowed in accordance with the provisions of said section.

While, under section 1 of the act of 1897, duties are imposed only on "articles imported from foreign countries," in section 30 of this act relating to drawbacks on "imported materials" the qualifying phrase in reference to foreign countries is omitted, and there is instead a broad and unqualified provision that drawbacks should be allowed on the exportation of all articles manufactured from "imported materials on which duties have been paid," the lan-

guage of this section containing no limitation of such drawbacks to materials brought in from foreign countries, which, under the doctrine of *De Lima* v. *Bidwell* (182 U. S., 1) and *Fourteen Diamond Rings* v. *United States* (183 U. S., 176), would technically exclude materials brought in from the Philippine Islands, unless such limitation is to be implied from the use of the word "imported" in connection with such materials or otherwise.

Although it is true that most of the definitions of the words "import" and "export" to be found in adjudged cases and elsewhere refer to the taking of goods from one country to another—this being ordinarily the only case in which import or export duties are imposed—it is also true that these words may be used in reference to the taking of goods from one part of a country to another (*Barrett* v. *Railway Company*, 2 Manning & Granger, 538, 543) or from one State to another (*Dooley* v. *U. S.*, 183 U. S., 151, 153). After careful consideration, I am of opinion that the word "imported," as used in section 30 of the act of 1897, does not necessarily imply that the materials on which the drawback is to be allowed must have come from a foreign country in a technical sense, but that the general purpose of this section was to provide that whenever materials are brought into this country under such circumstances that they are subject to the payment of duty and used here in the manufacture of finished articles, upon the subsequent exportation of such manufactured articles to a foreign country a drawback shall be allowed upon the material upon which duty has been so paid, the evident purpose of Congress being to encourage domestic manufactures for the purpose of export trade by returning on the exportation of the manufactured articles the duties originally collected on the raw material; and that, in the light of this purpose, both the spirit and the letter of section 30 are broad enough to include materials brought into this country from the Philippine Islands and subjected to duty as coming from a territory which, although not a foreign country, has not been permanently incorporated into the United States (*Downs* v. *Bidwell*, 182 U. S., 244; *Dorr* v. *United States*, 195 U. S., 138, 143), and has been temporarily treated in

Congressional legislation as not within the United States for tariff purposes; while in the Philippine revenue act and other special legislation relating to the tariff on trade with the Philippines the usual phraseology of the tariff laws imposing a duty on articles "imported" into the United States is not used, although products of the Philippines shipped into the United States are referred to in the act of March 3, 1905, as subject to an "export duty" upon their shipment; and while there is no provision in any of this legislation specifically applying to the Philippine Islands, "all laws affecting imports of articles * * * from foreign countries," as was done in the case of the Canal Zone by the act of March 2, 1905 (33 Stat., 843), unless the provisions of the act of July 1, 1902, applying to goods arriving from the Philippine Islands—"all laws relating to the collection and protection of custom duties"—is to be so regarded, it is nevertheless clear that under the special legislation relating to the temporary organization of the Philippine Islands, they are treated as territory remaining as yet outside of the United States in a tariff sense for the purpose of imposing duties on articles shipped from them "into" the United States analogous to those imposed on imports from a foreign country, and having such status that the term "imports" can be naturally and properly applied to merchandise brought from them into the United States, a view which is supported by the language used in the opinion of the court in *Downes* v. *Bidwell* (182 U. S., 244, 287) in reference to the Foraker Act, which imposed duties on trade between Porto Rico and the United States under similar conditions to those now existing between the Philippine Islands and the United States, in which it was said that "the Foraker Act is constitutional so far as it imposes duties upon *imports* from such island."

The plain inference would seem to be that as Congress subjected merchandise shipped from the Philippine Islands to the United States to a customs duty differing only in amount from that imposed on merchandise from foreign countries, it was likewise intended, in the absence of any provision indicating a contrary intention, that such mer-

chandise should in consequence receive all the corresponding benefits afforded by the general tariff act to which the Philippine tariff was assimilated, as it certainly can not be inferred, in the absence of any language expressly requiring such a conclusion, that Congress intended to impose on the products of the Philippine Islands the general burden of the tariff laws and at the same time deprive such products of the corresponding benefits thereunder.

I am constrained to the conclusion that no construction of this legislation should be adopted which would, in effect, penalize the Philippine Islands and put its materials, when shipped to the United States, in a worse position in the matter of drawbacks than materials brought from any foreign country, as, for example, Spain, unless such construction is required by the plain and imperative provision of the statutes, such construction, however, being, in my judgment, on the contrary, one which is not in accordance with the plain and natural meaning of the words used in the various statutes when read together and which can only be arrived at by giving to the words "imported materials" a narrow and restricted meaning in conflict with the evident purpose of the act.

While it is true that when the act of 1897 was passed there was no territory having the exact present status of the Philippine Islands or other unincorporated territory of the United States, nevertheless, as it is well settled that a tariff law is "made for the future" and will be held to apply to a class of goods fairly included within its terms, although such goods have not been manufactured at the date the act was passed (*Newman* v. *Arthur*, 109 U. S., 132, 138; *Pickhardt* v. *Merritt*, 132 U. S., 252, 257), by analogy, it would follow that its benefits should equally apply to a class of trade fairly coming within its terms, although not in existence when the act was passed.

Any other conclusion would, in my opinion, sacrifice the spirit and intent of the Congressional legislation to a strained construction of the letter, although it is well settled that if the letter of the statute conflicts with its plain intent the latter must prevail. (*United States* v. *Kirby*, 7 Wall., 482; *Smythe* v. *Fiske*, 23 Wall., 374, 380; *Carlisle*

v. *United States*, 16 Wall., 147, 153; *Heydenfeldt* v. *Daney Gold Company*, 93 U. S., 634, 638; *Church of the Holy Trinity* v. *United States*, 143 U. S., 457; *Lau Ow Bew* v. *United States*, 144 U. S., 47, 59; *Hawaii* v. *Mankichi*, 190 U. S., 197, 212.) In *Hawaii* v. *Mankichi* the court said:

"Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intention of the lawmaking power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in *Smythe* v. *Fiske* (23 Wall., 374, 380); 'A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law.' A parallel expression is found in the opinion of Mr. Chief Justice Thompson of the supreme court of the State of New York (subsequently Mr. Justice Thompson of this court), in *People* v. *Utica Ins. Co.* (15 Johns., 358, 387); 'A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute unless it be within the intention of the makers.' * * * So in *Heydenfeldt* v. *Daney Gold, etc., Co.* (93 U. S., 634, 638), it was said by Mr. Justice Davis: 'If a literal interpretation of any part of it (a statute) would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected.'"

An instance in which the rule has been laid down that in applying the tariff laws to territory acquired by the treaty with Spain they should be construed in harmony with their spirit, even if not with their letter, will be found in 24 Op., 55, in which the opinion was expressed by Attorney-General Knox that after the issuance of the President's proclamation, doing away with the duty imposed by the Foraker Act on trade between Porto Rico and the United States, while Porto Rico did not become technically a part of the United States, articles of Porto Rican origin were still to be regarded as products of the United States within the meaning of the provision of the tariff act of 1897, allow-

ing articles produced in the United States to be admitted free of duty when returned without having advanced in value or improved in condition.

For these reasons, as the raw sugar out of which the sirup in question was manufactured, had been brought from the Philippine Islands, and, as I have herein assumed, the duties were paid thereon under the Philippine revenue act, I am of the opinion that upon the subsequent exportation to Europe of the sirup manufactured therefrom a drawback should be allowed on such materials under the provisions of section 30 of the tariff act of 1897.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

DEPUTY COLLECTORS OF INTERNAL REVENUE—CLASSIFIED SERVICE—APPOINTMENT.

Deputy collectors of internal revenue would seem to be officers of the United States, at least in the sense that they are subject to classification under the civil-service law; but if not officers, they are employees of the United States; and, considered as either, the President has the right to include them in the competitive classified service.

Deputy collectors of internal revenue can not be considered employees of the collector.

Congress may place any restrictions it pleases upon the employment, by officers of the United States, of any kind of servants to assist them in the discharge of their duties.

Congress undoubtedly intended that the provisions of the civil-service law, so far as these provided for the organization of a classified service, should be extended to all persons engaged in the legitimate civil work of the executive branch of the Government, whether such persons were or were not technically in the employ of the United States.

A newly appointed collector of internal revenue has a legal right, upon taking office, to drop from the service any deputy collector in commission and to appoint deputies of his own selection, in accordance with the rules of the Civil Service Commission.

The civil-service law limits the power of removal in no respect except for the single act of failure to contribute money or services to a political party.

An employee's fitness, capacity, and attention to his duties are questions of discretion and judgment, to be determined by his superior officers, and such questions are beyond the jurisdiction of any court.

The rules regulating the power of removal may be repealed, altered, or amended at the pleasure of the President. They have merely the force of an Executive order and do not give the employees within the classified service any such tenure of office as to confer upon them a property right in the office or place.

A vacancy occurring in the office of collector of internal revenue and the appointment of a successor, would seem to have the effect, under section 3149, Revised Statutes, of vacating the offices of the deputy collectors.

It is the duty of the newly appointed collector to fill the offices thus vacated, either by recommissioning the deputies in service by an instrument in writing given under his hand, or by selections either from the eligible register or by transfer from other positions in the classified service, the precise method to be adopted being within the administrative discretion of the collector.

Section 3149, Revised Statutes, seems to require that a deputy collector of internal revenue should be appointed by the collector in commission, by an instrument in writing under his hand.

There is nothing in the civil-service law which in any way interferes with the right of the collector, under section 12 of the act of February 8, 1875 (18 Stat., 307), to require bonds of his deputies, payable to himself, for his protection against their neglect, default, or wrongdoing.

The recognition in a Federal statute of a person in the public employ as an officer of the United States constitutes such person an officer.

DEPARTMENT OF JUSTICE,
September 3, 1907.

SIR: I have the honor to acknowledge receipt of your letter of March 14, 1907, transmitting a letter from the Commissioner of Internal Revenue and asking for my opinion in regard to the matters discussed in that letter.

The Commissioner of Internal Revenue first questions the authority of the President, under existing law, to place deputy collectors of internal revenue in the competitive classified service. He further submits three questions, which he asks to have answered. Those questions are as follows:

"First. Has a newly appointed collector of internal revenue the right, upon taking office, to drop from the service any deputy collector in commission and appoint deputy

collectors of his own selection from the eligible list or from those in the classified service? If not, is it his duty, under the law, to recommission the deputy collectors in the service by an instrument in writing given under his hand? Can there be a legal deputy collector unless appointed by the collector in commission by an instrument in writing under his hand?

"Second. If compelled to retain in office deputy collectors holding under his predecessor, has the collector the right to require of these officials bonds payable to himself, to protect himself against their neglect, default, or wrongdoing?

"Third. If deputy collectors hold under a new collector by virtue of their being in office when he assumes the duties of his position, will the sureties on the bond of the collector be liable to the Government for the default of the deputy?"

It is my purpose to discuss, first, at some length the question as to whether the President may legally classify deputy collectors of internal revenue, and I believe that in the discussion of that question the other points in regard to which the Commissioner is in doubt may be cleared up.

Section 6 of the civil-service act provides for the classification of a limited number of persons in the departmental service at Washington and in certain post-offices and customs districts, and further states "that from time to time said Secretary (of the Treasury), the Postmaster-General, and each of the heads of Departments mentioned in the one hundred and fifty-eighth section of the Revised Statutes, and each head of an office, shall, upon the direction of the President, and for facilitating the execution of this act, respectively revise any then existing classification or arrangement of those in their respective Departments and offices, and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, *subordinate places, clerks, and officers in the public service* pertaining to their respective Departments not before classified for examination."

Section 7 provides that the following three classes of persons shall not be required to be classified, namely: (1) Officers other than those in the executive branch of the service; (2) persons employed merely as laborers or work-

men, and (3) persons who have been nominated for confirmation by the Senate.

It needs no argument to show that deputy collectors of internal revenue are not included in any one of the three classes mentioned in this section. These express exceptions exclude all others in accordance with the recognized rule of statutory construction. We are not, however, obliged to rely solely on the language of the statute in determining the intent of Congress in enacting the law. The report of the committee submitting the civil-service bill to the House and explaining its scope contains the following:

"But the subordinates in the Executive Departments, whose duty is the same under every administration, should be selected with sole reference to their character and their capacity for doing the public work. This latter clause includes *nearly all the vast number of appointed officials who carry into effect the orders of the Executive or heads of Departments, whether in Washington or elsewhere.*" (Senate Report 576, 1st sess. 47th Cong.)

Senator Hawley, of Connecticut, chairman of the committee having the bill in charge, in presenting the measure to the Senate, said:

"I propose to show that we have a reasonable, simple, and practical bill, open to no constitutional objection, not in any sense experimental, based upon absolutely conclusive experience, capable of being easily and economically executed, that will vastly improve *the whole civil service of the country.*"

In *United States* v. *Alger* (152 U. S., 384, 397), the court uses the following language:

"If the meaning of that act were doubtful, its practical construction by the Navy Department would be entitled to great weight."

See also *Swift* v. *United States* (105 U. S., 691, 695); *United States* v. *Graham* (110 U. S., 219), and *United States* v. *Tanner* (147 U. S., 661).

In applying this rule to the question immediately under consideration it becomes proper to consider the practical construction given to the civil-service act by the President and the Secretary of the Treasury.

Under the civil-service rules promulgated May 6, 1896, all officers and employees of the internal-revenue service were classified, and deputy collectors were put in the competitive class. On July 27, 1897, certain deputy collectors (182 in number) were withdrawn from the competitive class and made subject only to a pass examination to be prescribed by the Secretary of the Treasury. In September, 1897, it was urged by Collector Brady, of Richmond, Va., that deputy collectors could not be placed in the classified service, but his contention was not sustained by the Treasury Department. On May 29, 1899, the President removed all deputy collectors from the competitive class, retaining them, however, in the classified service and making them subject to a pass examination. On November 7, 1906, they were again, by Executive order, placed in the competitive class.

The President and the Treasury Department have, then, uniformly proceeded upon the assumption that deputy collectors of internal-revenue were classified, and under the rule laid down in *United States* v. *Alger*, *supra*, this practical construction is entitled to consideration if the case be doubtful.

In an opinion rendered to the Secretary of War, my predecessor, Attorney-General Moody, said:

"I think it a mistake to suppose that, in order to bring such appointments within the purview of the general law, [civil-service law] it would be necessary to state specifically in the act authorizing them, that they are to be made as thus prescribed, or as provided by law, or that such idea be expressed in any form. On the contrary, I think that in order to exempt such appointments from the operation of the general law, a specific exemption therefrom would be required." (25 Op., 341, 343.)

It seems clear, then, (1) that the language of the third clause of section 6 of the civil-service act is apparently broad enough to include deputy collectors; (2) that they are not among the classes specifically excluded from classification under section 7 of the act; (3) that the intent of Congress, as evidenced by the reports of the committee having charge of the civil-service bill, seems to be to include

all subordinate places in the executive civil service of the country; (4) that administrative officers have uniformly regarded deputy collectors of internal revenue as classifiable; and (5) that in order to except any appointees from the purview of the civil-service act such exclusion should specifically and clearly be so stated.

Any doubt that may exist as to the propriety of the classification of deputy collectors of internal revenue must arise from uncertainty as to their legal status. It is obvious that a deputy collector must be either (*a*) an officer of the United States, (*b*) an employee of the United States, or (*c*) an employee of the collector appointing him. It is, in my judgment, immaterial to which one of the three classes deputy collectors are held to belong, so far as the right of the President to classify them is concerned.

(1) Are deputy collectors officers of the United States?

Deputy collectors of internal revenue were authorized by the act of July 1, 1862 (12 Stat., 434), to provide internal revenue to support the Government, etc. This provision was reenacted in the acts of June 30, 1864 (13 Stat., 225), and February 8, 1875 (18 Stat., 309), and was carried into the Revised Statutes as section 3148. Up to that time the law provided that deputy collectors should be compensated for their services by the collector himself. In 1879, however, an important amendment was enacted (20 Stat., 329), and instead of being paid by the collector, as was formerly the case, they were "to be compensated for their services by such allowances as should be made by the Secretary of the Treasury upon the recommendation of the Commissioner of Internal Revenue."

The existing law is as follows:

"SEC. 12. That each collector of internal revenue shall be authorized to appoint, by an instrument in writing under his hand, as many deputies as he may think proper, to be compensated for their services by such allowances as shall be made by the Secretary of the Treasury, upon the recommendation of the Commissioner of Internal Revenue. * * * And the collector shall have power to revoke the appointment of any such deputy, giving such notice thereof as the Commissioner of Internal Revenue may prescribe, and to

require and accept bonds or other securities from any deputy; * * * but each collector shall, in every respect, be responsible, both to the United States and to individuals, as the case may be, for all moneys collected, and for every act done or neglected to be done, by any of his deputies while acting as such." (Act of February 8, 1875, as amended March 1, 1879, 20 Stat., 329.)

A deputy collector of internal revenue, whose official duties are prescribed by law and whose compensation is paid by the United States, would seem to be "an officer of the United States." (*United States* v. *Hartwell*, 6 Wall., 385.)

This contention seems strengthened by reference to the following statutes:

The act of March 3, 1885 (23 Stat., 404), provides:

"* * * And no collector in any district shall recommend, nor shall there be appointed or commissioned, more deputy collectors, storekeepers, storekeepers and gaugers, gaugers, inspectors, *or other officers*, or allowed to remain in commission more of any of *said officers*, at any one time, than fifteen per centum in excess of the number actually engaged in performing duty at the time and indispensably necessary to the performance of said duty."

By the act of July 11, 1888 (25 Stat., 272), it is provided that—

"* * * the number of deputy collectors, gaugers, storekeepers, and clerks employed in the collection of internal revenue shall not be increased, nor shall the salary of *said officers* and employees be increased beyond the salaries paid during the last fiscal year, exclusive of the number employed under the said act defining butter, and so forth."

It is well settled that the recognition of an association as an existing corporation in a statute constitutes such association a corporation de jure as well as de facto. (*Koch* v. *The N. A. Railway Co.*, 75 Md., 222; *Society for the Propagation of the Gospel in Foreign Parts* v. *The Town of Pawlet*, 4 Pet., 480, 501; Morawetz on Corporations, 2d ed., sec. 20, and authorities there cited.)

A fortiori it would seem to be clear that the recognition in a Federal statute of a person in the public employ as an

officer of the United States constitutes the person such officer.

It is, however, urged that deputy collectors of internal revenue can not be officers of the United States, because, if they are officers, then, under Article II, section 2, clause 2, of the Constitution, their appointment under the present method would be unconstitutional under the decision in *United States* v. *Germaine* (99 U. S., 508).

If it be assumed, argumenti gratia, that the method of their appointment would be unconstitutional if they are officers, it does not seem that this fact constitutes any bar to their classification, so long as they continue to be recognized as officers de facto.

In the case of *In re Ah Lee* (5 Fed., 899, 907) the court uses this language:

"A person actually in office by color of right or title—not a mere usurper or intruder—although not legally appointed or elected thereto, or qualified to hold the same, is still an officer de facto, or in fact, and, as a matter of public convenience and utility, his acts, while so in office, are held valid and binding as to third persons."

See also *Cocke* v. *Halsey* (16 Pet., 71); *Hussey* v. *Smith* (99 U. S., 20); *McDowell* v. *United States* (159 U. S., 596); and *Ex parte Ward* (173 U. S., 452).

It is not necessary at this time to consider whether the President could properly permit officers unconstitutionally appointed to discharge public duties and receive pay from public funds. If he does this in fact, whether properly or improperly, he certainly can with propriety treat such officers de facto as subject to classification. It would indeed place him in a wholly untenable position to maintain that the constitutionality of the appointment of these officers was insufficient to authorize their classification, but sufficient to permit their receiving pay, collecting taxes, seizing property, enforcing the laws of the United States, and suffering criminal consequences for delinquencies in such enforcement.

My attention has been further invited to the fact that the Court of Claims has said, *obiter*, that "Herndon (deputy collector of internal revenue) was not an officer." (*Lan-*

dram v. *United States*, 16 Ct. Cls., 85.) But it is to be noted that Herndon was employed prior to the act of March 1, 1879, supra.

It is further urged that a deputy collector differs in two respects from the clerk to the Assistant Treasurer mentioned in *United States* v. *Hartwell*, *supra*, since the latter's "compensation was fixed by law," and "vacating the office of his superior would not have affected the tenure of his place."

With respect to this it is to be observed that it applies yet more clearly to deputy marshals than to deputy collectors. Yet every deputy marshal is required by law to take an oath to "in all things well and truly, and without malice or partiality, perform the duties of the office of deputy United States marshal of the district of ——— during my continuance in said office." And it has been decided that a deputy marshal in protecting from violence one of the justices of the Supreme Court while traveling from his residence to the circuit court which he was to attend "acted in discharge of his duty as an *officer of the United States*." (*In re Neagle*, 135 U. S., 1.)

It seems, therefore, clear upon the decided weight of reason and authority that deputy collectors of internal revenue are officers of the United States, at least in the sense that they are subject to classification as such under the provisions of the civil-service law. I do not, however, consider it necessary to determine positively this question, for I think that it is clear if not officers they are employees of the United States, and if they are either there can be no question of the President's right to include them in the classified service.

(2) Are deputy collectors, if not officers, employees of the United States?

In *Landram* v. *United States* (16 Ct. Cls., 74, 85) the court said:

"At the last term of court we held that Herndon, while acting as deputy collector, was not an employee in a sense of making a privity of contract between him and the Government. But it does not necessarily follow that he was not a person in a branch of the public service. He was empow-

ered with "the like authority in every respect to collect the taxes levied or assessed within the portion of the district assigned to him which is by law vested in the collector himself." (R. S., 3148.)

The court then enumerates the extensive powers of deputy collectors under Revised Statutes, 3173, 3174, 3175. 3176, 3183, 3188, 3190, and 3196, and proceeds:

"It can not be maintained that a person charged with such extensive powers was not in public employment, although not employed directly by the United States, and was not in a branch of the public service."

In the *Twenty Per Cent* cases (first decision), 13 Wall., 568, 576, the court said:

"Many persons not employed as clerks or messengers of a Department, are in the public service by virtue of an employment by the head of the Department or by the head of some bureau of the Department authorized by law to make such contracts, and such persons are as much in the civil service within the meaning of the joint resolution as the clerks and messengers employed in the rooms of the Department building."

In the second decision, *Twenty Per Cent* cases (20 Wall., 179, 185), it is said that—

"* * * persons so employed here are properly to be regarded as employees in the civil service of the United States within the true intent and meaning of that phrase as there used, if they were employed by the head of the Department, or of the bureau or any division of the Department, charged with that duty and authorized to make such contracts and fix the compensation of the person or persons employed, even though the particular employment may not be designated in an appropriation act."

In the case of *John E. Foley* (3 Comp. Dec., 648, 653), it is said:

"Under the act to regulate and improve the civil service of the United States of January 16, 1883 (22 Stat., 403), the power of the President to designate those who are to be included in the classified service is not limited to officers of the United States in the constitutional sense of

the word 'officer.' He may also include those holding places or employments in the public service."

See also 5 Comp. Dec., 650, and section 6 of the civil-service act.

Applying the quotations from these opinions and decisions to the question under consideration, I conclude that if it be held that deputy collectors of internal revenue are not officers of the United States, they are certainly employees of the United States in every sense that is needed to justify their classification under the civil-service law.

(3) Can deputy collectors of internal revenue be considered employees of the collector; and if so, does this fact prevent their classification?

From what I have already said it is obvious that the first of these questions should be answered in the negative. Prior to the act of 1879 deputy collectors were undoubtedly employees of the collector in the sense that he alone was responsible for the payment of their compensation, the amount of which depended upon the terms of the contract of employment made by him with each one of them. Even before this change in the law, however, the court held that they were in the public service. (*Landram* v. *United States*, *supra*.)

Assuming, however, *argumenti gratia*, that they can be considered as employed by the collectors and not by the United States, does this assumed fact present any obstacle to their classification under the civil-service law? It seems clear that it does not. It can not be seriously denied that Congress may put any restrictions it pleases upon the employment by officers of the United States of any kind of servants to assist them in the discharge of their public duties. For example, by the act of 1825, relating to the post-office, contractors employed to carry the mails were forbidden to employ other than free white persons for this purpose. This was clearly a valid provision. (*United States* v. *Belew*, 24 Fed. Cas., 1080.) This discretionary power may be delegated to the President, or even to some inferior officer, if Congress sees fit. Indeed, it may be questioned whether, in the absence of any statutory pro-

vision, the President *motu proprio* as a part of his constitutional duty to "take care that the laws be faithfully executed," would not have the right to prescribe any reasonable regulations of this character looking to that end. It is not, however, necessary to determine this question here. The civil-service law, which was approved January 16, 1883, *supra*, repealed or nullified by implication any inconsistent provision in the acts of 1878 or 1879 relating to the Internal Revenue Bureau, so that if there be any repugnancy between these acts (which I do not think there is) this fact has no weight in the question under discussion. By section 6, as above quoted, the several "clerks and persons *employed* by the collector, naval officer," etc., in each customs district, and also "persons being *in* the public service at their respective offices" were made subject to classification. So "clerks and persons employed" (by whom is not stated) "or in the public service, at each post-office, or under any postmaster" are likewise subject to classification. Finally the Cabinet officers and "each head of an office" (not, be it noted, of a Department, bureau, or even division) is required under the direction of the President to revise any existing arrangement "of those in their respective Departments and offices" so as to effect the classification of "subordinate places, clerks, and officers in the public service" not previously classified.

It can hardly admit of doubt that a collector of internal revenue is a "head of an office" under the provisions of the section last quoted, and that his deputies, even if they be not officers or employees of the United States, nevertheless hold "subordinate places" in his office, and may be classified, if employed by him, just as persons employed by collectors of customs or naval officers, or by anybody at post-offices, or under postmasters, must be classified in cases mentioned in the first and second clauses of section 6. In other words, I think that Congress undoubtedly intended that the provisions of the civil-service law, so far as these provided for the organization of a classified service, should be extended to all persons engaged in the legitimate civil work of the executive branch of the Government, whether such persons were or were not technically in the employ of

the United States. It seems, therefore, that there can be no question as to the right of the President to include deputy collectors of internal revenue in the competitive classified service.

Answering his interrogatories categorically, I beg to advise you that a newly appointed collector of internal revenue has a legal right upon taking office to drop from the service any deputy collector in commission, and to appoint deputies of his own selection, in accordance with the rules of the Civil Service Commission. The civil-service law limits the power of removal in no respect except for the single act of failure to contribute money or services to a political party. (Civil-service act, section 13.) An employee's fitness, capacity, and attention to his duties are questions of discretion and judgment to be determined by his superior officers. Such questions are beyond the power of any court. (*Taylor* v. *Taft*, 203 U. S., 461.)

The rules regulating the power of removal were made by the President, and may be repealed, altered, or amended at his pleasure. They have merely the force of an Executive order, and do not give to the employees within the classified service any such tenure of office as to confer upon them a property right in the office or place. (*Morgan* v. *Nunn*, 84 Fed., 551.)

Under section 3149, Revised Statutes, it would appear that a vacancy occurring in the office of a collector, and the appointment of a successor, has the effect of vacating the offices of the deputy collectors. That being so, it is the duty of the newly appointed collector, under the law, to fill these offices in accordance with the civil-service rules, either by recommissioning the deputies in service by an instrument in writing given under his hand, or by selections either from the eligible register or by transfer from other positions in the classified service. The precise method to be adopted is one for administrative determination. Section 3149, Revised Statutes, seems to require that a deputy collector should be appointed by the collector in commission by an instrument in writing under his hand.

Answering the second question propounded by the Commissioner of Internal Revenue, I beg to inform you that

there is nothing in the civil-service law which in any way interferes with the right of the collector to require of his deputies bonds payable to himself, to protect him against their neglect, default, or wrongdoing. The collector may, therefore, continue to require bonds in accordance with the provisions of section 12 of the act of February 8, 1875.

My answer to the first question propounded makes it unnecessary to answer the third.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

PASSPORTS—NATIVES RESIDING IN THE CANAL ZONE.

Citizens of Panama who were residents of the Canal Zone at the time of the treaty between the United States and Panama, and who have not taken any affirmative action to retain citizenship in that Republic, owe allegiance to the United States and are entitled to passports.

Section 4076, Revised Statutes, which provides that no passport shall be granted or issued to any other persons than those owing allegiance to the United States, means permanent allegiance, and not the temporary allegiance owing from a resident.

The sovereignty of the Canal Zone is not an open or doubtful question.

The words "sovereign rights," "within the Zone," in Article III of the treaty of November 18, 1903, with Panama (33 Stat., 2234), mean, among other things, the right to the allegiance of the Zone's people.

It is well settled that in cases of acquisition of inhabited territory, the acquiring sovereign becomes entitled to the allegiance of the inhabitants unless there is something in the treaty or act of cession providing otherwise.

DEPARTMENT OF JUSTICE,
September 7, 1907.

SIR: I have your request for an opinion, as follows:

"I have the honor to inclose herewith a copy of a dispatch from the American legation to Guatemala and Honduras, submitting the passport application of one Henrique S. Ruata, a native of the district now included in the Panama Canal Zone. I also inclose a memorandum in the

matter, prepared in the office of the Solicitor for this Department.

"I beg to request your consideration of the case and an expression of your opinion as to whether or not the Secretary of State is authorized to issue a passport to the applicant."

In the absence of anything in your letter or accompanying papers indicating the contrary, I assume, as does the Solicitor for your Department, that the Mr. Ruata in question was a citizen of Panama and a resident of the Canal Zone at the time of the making of the canal treaty between the United States and Panama; and I shall further assume he has not taken any affirmative action to retain citizenship in the Republic of Panama, since he is applying for a passport from our Government.

The recent legislation of the United States provides that:

"No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." [32 Stat., 386.]

I agree with the Solicitor that permanent allegiance, and not temporary allegiance owing from a resident, is meant by the statute.

In my opinion the sovereignty over the Canal Zone is not an open or doubtful question.

Article 3 of the treaty transfers to the United States, not the sovereignty by that term, but "all the rights, power and authority" within the Zone that it would have if sovereign, "to the entire exclusion of the exercise by the Republic of Panama of any such *sovereign* rights, power or authority."

The omission to use words expressly passing sovereignty was dictated by reasons of public policy, I assume; but whatever the reason the treaty gives the substance of sovereignty, and instead of containing a mere declaration transferring the sovereignty, descends to the particulars "all the rights, power, and authority" that belong to sovereignty, and negatives any such "sovereign rights, power, or authority" in the former sovereign.

The "rights" so transferred are to be enjoyed (article 2)

" in perpetuity," and no exception is made of any persons or things in the Zone.

I am unable to perceive that this language is obscure or ambiguous or that we are warranted in resorting to any construction of it except by the first rule of construction—that plain and sensible words should be taken to mean what they say. The words " sovereign rights " " within the Zone " mean, among other things, the right to the allegiance of the Zone's people.

According to international law, with which American practice in framing treaties and dealing with inhabitants of such territory has been consistent, it is well settled that in cases of acquisition of inhabited territory the acquiring sovereign becomes entitled to the allegiance of the inhabitants, unless there is something in the treaty or act of cession providing otherwise; as, for example, that the inhabitants may elect to retain their old citizenship. (Hall's International Law, 4th ed., p. 594.)

In my opinion, therefore, the United States has acquired the right to the allegiance of Mr. Ruata, and he has acquired the corresponding right to be protected by them and to the means of obtaining their protection, including passports.

Respectfully.

CHARLES J. BONAPARTE.

The SECRETARY OF STATE.

ATTORNEY-GENERAL—OPINION—GERONIMO GARCIA—IMMIGRATION.

The Attorney-General can not properly review a record and memorandum submitted, and render his opinion, based upon facts deduced therefrom, as to the correctness of a proposed action of the Secretary of Commerce and Labor in the matter of the appeal of Geronimo Garcia, an alien who was excluded from the United States by the decision of the board of special inquiry at the port of New Orleans.

It has been the invariable rule of the Department to decline to give an opinion upon any question of law unless it is " specifically formulated " and " accompanied by a statement or finding of the facts involved." (23 Op., 330; 23 Op., 473; 24 Op., 59; 24 Op., 102.)

DEPARTMENT OF JUSTICE,
September 19, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of the 28th ultimo in which you inclose the record of the proceedings in the matter of the appeal of the alien Geronimo Garcia, who has been excluded from the United States by the decision of the board of special inquiry at the port of New Orleans, together with a memorandum in reference thereto prepared by the solicitor of your Department, and request me to review this memorandum in order that, if it meets my views entirely, you may take the action therein indicated.

Your letter does not request my opinion on any specific question of law, but only, as I understand it, upon the general question whether, upon the facts presented in the record, Garcia's appeal should be dismissed in accordance with the memorandum of the solicitor.

I regret to say that a compliance with this request would involve a departure from the settled policy of this Department, as it would necessitate an examination of the entire record and a determination of the facts as established by the testimony taken before the board.

It has, however, been the invariable rule of this Department to decline to give an opinion upon any question of law unless it is "specifically formulated" and "accompanied by a statement or finding of the facts involved." (23 Op., 330; 23 Op., 473; 24 Op., 59; 24 Op., 102, and previous opinions therein cited.)

I am therefore reluctantly constrained to decline to express the opinion requested.

I should add, however, that if you should desire my opinion on any specific question of law arising in connection with this case, upon any definite state of facts, I should be glad, upon your request, to express an opinion thereon.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF COMMERCE AND LABOR.

TITLE TO BUILDINGS AND GROUNDS, LEGATION OF THE UNITED STATES IN CONSTANTINOPLE.

Section 355, Revised Statutes, which requires the opinion of the Attorney-General upon the validity of the title to any land purchased by the United States for the erection of any public building thereon, does not apply to the buildings and grounds now occupied by the legation of the United States at Constantinople, Turkey, the purchase of which was provided for by the act of June 16, 1906 (34 Stat., 286, 293), since no erection of a building is contemplated by that act.

DEPARTMENT OF JUSTICE,
September 19, 1907.

SIR: I have the honor to acknowledge the receipt of your communication of yesterday, in which, after calling attention to that portion of the diplomatic and consular appropriation act approved June 16, 1906 (34 Stat., 286, 293), which provides "For the purchase of the buildings and grounds now occupied by the legation of the United States in Constantinople, Turkey," you state that, as appears from a dispatch accompanying your letter, our ambassador has succeeded in contracting for the purchase of the buildings and grounds in question, and therefore you request my opinion as to "whether or not section 355 of the Revised Statutes applies to such a purchase, and whether or not the question of the validity of the title to the property contracted for should be submitted to the Attorney-General in accordance with the provisions of that section."

The statutory provision referred to is as follows:

"No public money shall be expended upon any *site* or *land* purchased by the United States *for the purposes of erecting thereon* any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building, of any kind whatever, until the written opinion of the Attorney-General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given."

The appropriation act here in question does not provide for the expenditure of money upon any site or land pur-

chased for the purpose of erecting thereon a public building, and it seems that no such action is contemplated. In compliance with the terms of the act, a purchase of "the buildings and grounds now occupied by the legation" has been negotiated.

For this reason I am clearly of the opinion that the provision of section 355, above quoted, does not apply to the transaction in question.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF STATE.

IMMIGRATION—DEPORTATION—ATTENDANTS—TRANSPORTATION—EXPENSE.

The Secretary of Commerce and Labor is empowered by sections 20 and 21 of the act of February 20, 1907 (34 Stat., 898, 904), to select attendants to accompany aliens ordered to be deported, where they are mentally or physically diseased in such a manner as to require attendance and care during the voyage.

The steamship or transportation companies by which such aliens came to this country are required to receive the attendants so selected, at the same time that they receive the aliens to be deported, and convey them, with the aliens, to the foreign place of destination.

The steamship companies are required to furnish such attendants transportation to and from the alien's destination and to defray all expenses incident to such employment.

The "expense incident to such service" is all the expense directly and incidentally caused by the fact that such service has been required. This includes the return trip of the attendant and also his compensation. The expression "all the expenses incident to the employment and detail of attendants," comes under the same head.

If the attendant in going has traveled in a class in which he would not naturally travel, by reason of the necessity for his constant attendance upon the disordered alien, his ticket may be changed on the return trip.

If there are, as suggested, a variety of cases properly admitting of the separate classification of the two persons, the Department of Commerce and Labor can not determine arbitrarily to what class the attendant is to be consigned.

The steamship company, on the other hand, can not nullify the law by insisting that attendants travel in the steerage when they are not needed there and are persons who could not be reasonably expected to accept employment upon such conditions.

The interests of the steamship company are, so far as may be consistent with the reasonably successful working of the scheme of sending these attendants, to be allowed to prevail over the mere pleasure or convenience of the persons sent.

When the law imposes a burdensome requirement upon an individual to do some act which can be reasonably well done in several ways, and does not expressly or impliedly require it to be done in any particular way, it can be satisfied by doing the act in the way least expensive or troublesome to the individual.

A regulation of the Department which provides that "attendants will accompany aliens to official destination and will, when proceeding abroad, be required to travel under the same conditions as the alien," is appropriate, if in nearly all cases the usefulness of the attendants would be seriously impaired unless they went in the same class as the alien; but the second part of the regulation, providing that all attendants "when returning shall travel second class," is not binding upon the vessel owners.

DEPARTMENT OF JUSTICE,
September 23, 1907.

SIR: I have received your request for an opinion as follows:

"Since the 1st of July, 1907, this Department has, when ordering the deportation of aliens under the provisions of sections 20 and 21 of the act approved February 20, 1907, entitled 'An act to regulate the immigration of aliens into the United States,' inquired into the condition of health of such aliens, and when it has been found that they are mentally or physically diseased in such a manner as to require attendance and care during the voyage to the port of foreign embarkation and thence to the place of the alien's final destination, the Department has called upon the steamship company responsible for such alien's presence in the United States to furnish transportation for the alien from the American port of deportation to the place of final destination, and also transportation for the attendant from such port of deportation to the place of the alien's final destination, and for such attendant's return to the United States. This action has been taken under the impression that it was authorized by the proviso to section 21 of the act above

mentioned, reading: '*Provided*, That when in the opinion of the Secretary of Commerce and Labor the mental or physical condition of such alien is such as to require personal care and attendance, he may employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in like manner.' It is also the intention of the Department, as shown by Rule 37 of its Regulations of July 1 last (copy inclosed), to require the transportation companies to reimburse it for the expenses incident to the employment and maintenance of the attendant; although, as it has not yet been necessary to demand the payment of a bill covering such items, that point has not yet become a matter of controversy. Several of the steamship lines, however, have refused to furnish transportation for attendants when required by the Department to do so, and others, while furnishing the transportation, have protested and stated that, in their opinion, the Government, even if legally authorized to require them to take on board attendants furnished for deported aliens, has no authority of law to place upon them the burden of transporting the attendants to and from the foreign place of destination free of charge.

"In view of the above-recited circumstances, I have the honor to request an expression of opinion on the following questions:

"1. Is this Department empowered by sections 20 and 21 of the act approved February 20, 1907, to select attendants to accompany aliens ordered deported under said sections and to require the transportation companies responsible to take such attendants on board at the time they receive the aliens for deportation and convey them, with the aliens, to the foreign place of destination, returning the attendants to the United States?

"2. Do the sections mentioned authorize the Department to require that the steamship companies shall furnish transportation to these attendants, free of charge to the Government, both to and from the foreign place of the accompanied aliens' destination, and also to demand of the transportation companies payment of all expenses incident

to the employment and detail of attendants in the manner described?

"3. If the two preceding questions are answered in the affirmative, should the attendant selected by the Department travel under the same conditions as the deported alien, i. e., steerage, third, second, or first class, as the case may be, and should his travel, both en route to and returning from the place of final destination, be under such conditions, or may the class of his ticket be changed on the return trip? If the facts presented do not make possible a direct answer to this question, is the subject one for the determination of which, on the circumstances presented in each instance, this Department is invested with due authority?"

In order to show more completely what questions your letter presents, I quote sections 20 and 21 of the act of February 20, 1907, which must be construed in order to answer them, namely:

"SEC. 20. That any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. Such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States, or, if that can not be done, then the cost of removal to the port of deportation shall be at the exepnse of the 'immigrant fund' provided for in section one of this act, and the deportation from such port shall be at the expense of the owner or owners of such vessel or transportation line by which such aliens respectively came: *Provided*, That pending the final disposal of the case of any alien so taken into custody he may be released under a bond in the penalty of not less than five hundred dollars, with security approved by the Secretary of Commerce and Labor, conditioned that such alien shall be produced when required

for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States.

"SEC. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided by section twenty of this act, and a failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of Commerce and Labor to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this act shall be punished by the imposition of the penalties prescribed in section nineteen of this act: *Provided*, That when in the opinion of the Secretary of Commerce and Labor the mental or physical condition of such alien is such as to require personal care and attendance, he may employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in like manner."

You desire to know, first, whether, in my opinion, your Department is empowered "to select attendants to accompany aliens ordered to be deported, and to require the transportation companies to take such attendants on board."

I understand this question to ask as to the power of the Department to determine, without consulting the vessel's owners, what manner of persons and who shall be the attendant in a particular case, and to require the person selected to be accepted by the vessel owners.

I think the law intends to give you that power of selection. It is you who are to determine what is the mental and physical condition of the alien, what kind of personal care and attendance his peculiar condition requires, and "employ" a person suitable, in view of what you consider

his condition, to give him the care you find to be necessary. The attendant is your own employee and agent in giving such care. I do not think there can be any doubt that the choice of the person is intended to be wholly within your discretion and that the person you choose must be accepted.

Your next inquiry, as I understand it, is whether the steamship companies must convey the attendants with the aliens to the foreign place of destination. The law says the attendant "shall accompany the alien to his or her final destination," immediately after penalizing the refusal of the vessel owners and their representatives to "take on board, guard safely, and return to the country whence he came any alien ordered to be deported." I do not see how this provision of law can be carried out unless the vessel owners "receive the attendants on board at the time they receive the aliens for deportation and convey them, with the aliens, to the foreign place of destination."

Your next question is whether the vessel owners must return the attendants to the United States. This may be conveniently considered with the question which follows, whether the sections quoted require the steamship companies to furnish the attendants transportation to and returning from the foreign place of the alien's destination, and with the next question, whether you have a right to demand payment of all expenses incident to the employment and detail of attendants.

The provision of section 21, after saying that the Secretary of Commerce and Labor may employ the attendant and that he shall accompany the alien to the final destinations, adds, "and the expense incident to such service shall be defrayed in the like manner." This can refer to nothing but all or some of the language of section 20 concerning the cost of removal of the alien himself, viz:

"Such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States, or, if that can not be done, then the cost of removal to the port of deportation shall be at the expense of the 'immigrant fund' provided for in section one of this act,

and the deportation from such port shall be at the expense of the owner or owners of such vessel or transportation line by which such aliens respectively came."

To have the expense arising from the fact that an attendant goes with the deported alien, defrayed in like manner to this, is to have it paid by those deemed responsible for the presence of the obnoxious alien, except where "that can not be done," in which case the immigrant fund is to be used and is to charge this expense, so far as concerns the voyage from the port of deportation to the "vessel or transportation line by which such aliens respectively came."

The one person goes as the companion of the other; the "like manner" is a natural phrase to apply to the expense in the case of alien and attendant, both going together in order that a single obnoxious alien may be returned to the country whence he was unlawfully brought. Naturally, whoever should pay for deporting the alien should be charged, as part of the expense, with the cost occasioned by his having to be accompanied by an attendant; and that is clearly the intent of this proviso.

But what is included in "the expense incident to such service?" Incident to the service how—to its being rendered or to its being furnished or having existence?

It seems to me that, even if "such service" means the service of "personal care and attendance" rendered by the attendant to the alien, it does not follow that "incident" means incidental to caring for or attending upon the alien. The purchase of a few medical supplies consumed or the like would be all we should bring within the phrase, if so interpreted. The purpose of the law to make the steamship company pay, for various reasons, the expense of deporting the alien himself, and the purpose of the law for the same reasons to liken the attendant to the alien, so far as the defraying of expense is concerned, being both clear, it seems to me that "the expense incident to such service" is all the expense directly and naturally caused by the fact that such service has been required.

The return trip of the attendant comes under this head, as also his compensation. "All the expenses incident to the employment and detail of attendants" come under the same head.

I accordingly answer your questions above quoted in the affirmative.

Your next question is whether, if the preceding questions are answered in the affirmative, the attendant selected should travel under the same conditions as the deported alien, i. e., steerage, third, second, or first class, and should he do so both going and returning or may he return otherwise.

If the facts you present do not enable me to answer directly, you wish to know whether "the subject is one for the determination of which, on the circumstances presented in each instance, this (your) Department is invested with authority."

I do not suppose you are asking whether, in a special case, for good reasons concerning the mental or physical condition of the alien, you could direct your agent to remain so constantly with the alien that he would need travel in the same class, but whether you can lay down for the vessel owners a general rule, such as that stated in an official pamphlet containing the immigration law, viz, "attendants will accompany aliens to final destination and will, when proceeding abroad, be required to travel under the same conditions as the alien; and when returning will travel second class."

Of course, if it were practically always the case that the attendant could not accomplish the purpose for which he is employed without being in the same class of passengers with the alien, it could well be said that Congress knew this and intended that they should be of the same class on the outward voyage. But the matter may not be so simple. It may be that a great variety of mental and physical conditions lead to the need of such care and attendance as would not be inconsistent with the separate classification of the two passengers; also that an attendant might be a menial and the immigrant a person able to travel in the first class, or that the alien might be, as I suppose he usually is, one of the kind who travel in the steerage, and the attendant required by his condition might be one accustomed to travel in the first class—a person of professional or scientific training.

To such circumstances the principle is to be applied that when the law imposes a burdensome requirement upon an individual to do some act which can be reasonably well done in several ways and does not expressly or impliedly require it to be done in any particular way, the law can be satisfied by doing the act in the way least expensive or troublesome to the individual. He is merely commanded to do the act and it suffices that he has done it in a reasonably good way, in view of the object of the Legislature. Of course, he can not satisfy the law by merely complying with its letter while defeating its object.

The facts presented do not enable me to answer very explicitly. I may say that if the attendant in going has traveled in a class in which he would not naturally travel, by reason of the necessity for his constant attendance upon the disordered alien, there is no reason why his ticket may not be changed on the return trip.

If there are, as suggested, a variety of cases properly admitting of the separate classification of the two persons, I do not think your Department can determine arbitrarily to what class the attendant is to be assigned. I find no language in the law conferring such authority. On the other hand, the steamship company can not nullify the law by insisting that attendants travel in the steerage when they are not needed there and are persons who could not reasonably be expected to accept the employment upon such conditions. Such conduct would be a refusal to transport.

This law undertakes to regulate a business, and should be applied in a businesslike way. Persons of the kind that travel in the steerage are not to be needlessly promoted to first class, and persons accustomed to travel as first-class passengers are not to be needlessly put down in the steerage; but the interests of the steamship company are, so far as may be consistent with the reasonably successful working of the scheme of sending these attendants, to be allowed to prevail over the mere pleasure or convenience of the persons sent.

The first part of the regulation above quoted is an appropriate rule under the law, if in nearly all cases the usefulness of the attendants would be seriously impaired unless

they went in the same class with the alien. The second part of the regulation, providing that all attendants "when returning shall travel second class," is, in my opinion, not binding upon the vessel owners.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF COMMERCE AND LABOR.

WEIGHING OF THE MAILS.

Order 165 of the Post-Office Department, with regard to weighing the mails on railroad routes, which provides that "*the whole number of days the mails are weighed* shall be used as a divisor for obtaining the average weight per day," may lead to arbitrary and inequitable results.

Order 412, which provides that "*the whole number of days included in the weighing period* shall be used as a divisor," will give as the average weight per day during a year, the average weight during somewhat more than one-fourth of a year, without resulting in greater inaccuracy or injustice than is authorized and contemplated by the act of March 3, 1905.

The mails are to be weighed, under the act of March 3, 1905 (33 Stat., 1088), on "working days" only, and "working days" mean days in which the carrier does work for the post-office—not "week days."

The act does not prohibit the Postmaster-General from weighing the mails throughout the year, nor does it require that the number of working days on which the mails are weighed shall be the same in the case of every carrier, although in none may they be less than ninety, or other than "successive" days.

The form and method in which the information obtained from weighing the mails shall be utilized is a matter within the discretion of the Postmaster-General, provided his action shall be directed to the ascertainment of what, in his judgment, would be an average weight per day of mails carried during a year, as nearly true as may be practicable, to be used as a basis for the yearly compensation of the carriers.

Where the meaning of a statute is doubtful or ambiguous, the practical construction placed upon it by the Department of the Government charged with its administration, if contemporaneous, uniform, and long continued, although not deemed controlling on the courts, will ordinarily be followed.

Departmental construction is, however, without weight where the statute is clear and explicit and free from ambiguity or doubt.

The practice of weighing the mails on Sundays, and yet of excluding Sundays from the divisor when the average is to be ascertained, is clearly erroneous. If Sundays are not "working days," the law does not permit the mails to be weighed on that day; if they are "working days," their exclusion from the division renders the result of the computation false.

DEPARTMENT OF JUSTICE,
September 27, 1907.

SIR: I have the honor to acknowledge your request for an opinion as to the legality of order 412 of your Department, issued June 7, 1907, and of order No. 165, for which it was a substitute. I learn from you that these orders are as follows:

Order No. 165, dated March 2, 1907:

"That when the weight of mail is taken on railroad routes, *the whole number of days the mails are weighed* shall be used as a divisor for obtaining the average weight per day."

Order No. 412, dated June 7, 1907:

"When the weight of mail is taken on railroad routes, *the whole number of days included in the weighing period* shall be used as a divisor for obtaining the average weight per day."

The statutes which appear to bear directly on the subject are the following:

"Section 4002 of the Revised Statutes (from the act of March 3, 1873, 17 Stat., 558):

"SEC. 4002. The Postmaster-General is authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned:

"First. That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails.

"Second. That the pay per mile per annum shall not exceed the following rates namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, sev-

enty-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, *the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty*, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster-General may direct."

Post-office appropriation act of March 3, 1875 (18 Stat., 341), following an appropriation for inland mail transportation by railroad:

"* * * And out of the appropriation for inland mail transportation the Postmaster-General is authorized hereafter to pay the expenses of taking the weights of mails on railroad routes, as provided by the act entitled 'An act making appropriations for the service of the Post-Office Department for the year ending June thirtieth, eighteen hundred and seventy-four,' approved March third, eighteen hundred and seventy-three; and he is hereby directed to have the mails weighed as often as now provided by law by the employees of the Post-Office Department, and have the weights stated and verified to him by said employees under such instructions as he may consider just to the Post-Office Department and the railroad companies."

Post-office appropriation act of March 3, 1905 (33 Stat., 1088), following an appropriation for inland mail transportation by railroad:

"Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, *the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days, not less than ninety*, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once

in every four years, and the result to be stated and verified in such form and manner as the Postmaster-General may direct."

The acts of July 12, 1876 (19 Stat., 79), June 17, 1878 (20 Stat., 142), and March 2, 1907 (34 Stat., 1205–1212), make certain changes in the rates of compensation, but none in the method of ascertaining the average daily weight of mail transported.

Were this question *res integra* I should not consider it one of much difficulty. Section 4002, Revised Statutes, fixes a rate of *yearly* pay *per* mile of track used to transport the mails, determined by the "average weight of mails *per* day" carried the entire length of the route. I see no escape from the conclusion that this means the average weight *per* day *during a year;* so that if, on a particular route, there were thus carried *on one day* 365,000 pounds and on the remaining three hundred and sixty-four days *nothing at all*, the "average weight of mails *per* day," on which the annual compensation should be calculated, would be 1,000 pounds. If, therefore, it had been deemed practicable or advisable to weigh all the mails transported by rail every day of the year there could have been, to my mind, no doubt as to how the "average weight per day" would be determined; whether the mails were so carried on three hundred and sixty-five days or on three hundred and thirteen or on one hundred and fifty-six or on twelve, or, as above suggested, on one day, their aggregate weight would have been added up and divided, in all cases alike, by 365.

It is, however, often impracticable without unreasonable labor to ascertain a *strictly* accurate average, and, in such cases, a conventional average is frequently established by law, agreement, or custom, which is nearly enough right for all practical purposes and can be ascertained with vastly less trouble. A familiar example of this practice is the calculation of interest on a current bank balance. For this to be *absolutely* correct the balances due on *every day* of the year would have to be determined, added up, and divided by the whole number of days, i. e., 365, which, in the case of, say, a savings bank with many thousands of

small accounts might involve an expense altogether disproportionate to the amount of the interest. It is, therefore, customary to ascertain the balances on a comparatively small number of days, often twelve, throughout the year, average these, and *assume* the result to be the average annual balance for the purpose of calculating interest.

It seems to have been, or to have been thought, unreasonably burdensome to require the mails to be weighed every day of the year; and the Congress, by the acts of March 3, 1873, and March 3, 1905, above noted, prescribed conventional methods of ascertaining the average weight. The methods are thus stated:

Act of March 3, 1873:

"* * * *the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty*, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster-General may direct."

Act of March 3, 1905:

"* * * *the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days, not less than ninety*, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster-General may direct."

It will be noted that these two acts say nothing about "divisors" and, indeed, do not profess to deal with the method of computation at all; how from the statement of weights he should obtain the result sought, that is to say, the daily average *for a year* on which the compensation was to be based, was a matter left to the discretion of the Postmaster-General; the Congress said to him only: "You need not cause the mails to be weighed every day of the year to ascertain the average weight *per* day during the year: you may, if you so choose" (for, it is to be observed, the law is *permissive* merely: the Postmaster-General, if he

has money enough, *may* order the mails to be weighed for three hundred and sixty-five days) "you may, if you choose, weigh the mails only thirty (now ninety) days of each year and only once in four years; but if you do this, the days selected must be *working days* and must be *successive.*"

It is important to determine the meaning of the words lastly above italicized. It is said that "working days" has been consistently interpreted by the practice of your Department to mean "week days." I do not think this statement can be sustained, for I am informed by you that prior to the act of 1905 the practice had been to weigh the mails on *thirty-five consecutive* days, thus including five Sundays. Now, I think, the law is on *one* point, at all events, perfectly clear—the mails are to be weighed on "working days" and on "working days" *only;* the use of the word "successive," instead of "consecutive" or some term of similar import, harmonizes exactly with this literal and, to my mind, unavoidable, interpretation of the remaining words used. If, therefore, "working days" are to be read "week days," the practice of your Department, in thus weighing the mails on five Sundays, has been altogether illegal; if, however, the meaning of "working days" be "days on which mails are carried," the practice, to this extent, has been legal and in accord with what I believe to be the true intent of the law. As the practice of any of the great Executive Departments must always be *assumed*, so far as such assumption be possible, to rest upon a consistent and tenable view of the law, it is, I think, fair to say that the *practice* of the Post-Office Department, as contradistinguished from the *language* sometimes used by prominent officials in the course of the prolonged discussion of questions connected with this subject-matter, sustains the view that the words "working days" mean "days on which the carrier does work for the Post-Office," and not "week days;" and this I regard as clearly the true interpretation of the law.

It would seem, however, that an error has crept into the practice of your Department, as hereinafter stated, in the

method of dealing with the information furnished through weighing the mails for at least thirty, now ninety, working days. As above noted, the obvious purpose of this provision is to relieve the Postmaster-General from the necessity of weighing the mails for *every* working day of the year. It does not prohibit him from weighing the mails throughout the year; nor does it require that the number of working days on which the mails are weighed shall be the same in the case of every carrier, although in none may they be less than thirty, now ninety, or other than "successive." Moreover, it in nowise changes the *purpose* of the inquiry, which, as above explained, has always been to ascertain a fair average *per* day *during a year;* not, of course, a fair average *per* day during seven or thirty or thirty-five or ninety or one hundred and five days, or any other fraction of a year. Having obtained from the results of the weighing such information as it can furnish as to the fair average weight for a "working day," it is left to the Postmaster-General to so deal with this information as to determine from it by appropriate calculations what would be a fair daily average for the ends of the law, i. e., as a basis for an annual compensation. It is obvious that from the *mere weighing* (which is all the law *prescribes*), standing *alone*, nothing would be determined as to the average; the Postmaster-General must therefore do *something* not mentioned in the statute to ascertain this, and although this matter is left to your discretion, and you are, of course, in nowise bound by any views expressed in this opinion regarding it, I think it may conduce to clearness if I here indicate what form of calculation appears to me best adapted to attain the ends of the law. We may suppose three railroads, of which one serves the mails seven; one, six, and one, three days in each week, and that the aggregate results of the weighing, divided by the number of days on which, in each case, the mails have been weighed, shows in each a daily average *per* working day of 1,000 pounds. In detrmining for each the fair average *per* day during a year, no change is needed in the figures for the first; those for the second should be reduced by one-seventh, and those for

the third by four-sevenths; so that the first would be 1,000 pounds, the second, 857.14 pounds, the third, 428.57 pounds.

I have said that I should consider the question involved in your request one of no great difficulty were it a new one; such, however, is not the case.

Prior to the issuance of order No. 165 on March 2, 1907, the uniform practice of the Post-Office Department, except for a short period in 1884, as hereinafter stated, in determining the average daily weight of mail transported on railroad routes appears to have been to have such mail weighed for a period covering not less than thirty successive working days (which term had been alleged to mean thirty successive week days, and therefore made such weighing period cover at least five weeks, or thirty-five days), and in every case, whether the mail was carried and weighed three, six, or seven days of the week, to divide the total weight thus ascertained by the number of working or week days in such period—that is to say, thirty. Thus, in the case of a route on which the mail was carried three days of the week, the weight was taken on such days for five weeks and the aggregate of the fifteen weighings divided by thirty to obtain the daily average. The same process was followed for thirty or thirty-five weighings, respectively, in the cases of routes on which the mail was carried six and seven days of the week. The average obtained was described as a "working" or "week" day average, and not considered a daily average; but with regard to Sunday-carrying roads it was evidently neither.

This practice, it appears, grew out of an effort to compensate the Sunday-carrying roads for facilitating the transmission of the mails. It was thought that, if the weight of mails carried on Sundays had been omitted in the case of such roads, they would not only have received no compensation for carrying the same, but would have suffered an actual loss by reason of their diligence, because, by delaying the same until Monday, it was said that they could have had such mail weighed in on that day.

In a letter from the Second Assistant Postmaster-General to C. Jay French, Superintendent Railway Mail Serv-

ice, fifth division, dated March 24, 1876, there are the following instructions:

"The mails are to be weighed for the given number of successive working days (thirty in the weighing, to which these instructions particularly relate), and in case mails are carried on any route also on Sundays, returns of the weights of such Sunday mails are to be furnished in the same manner as the others, to be included in consolidating the returns for the period, the object being, as you are aware, to obtain a fair average of the service for the working year. On the other hand, if mails are conveyed less frequently than every working day the period of the weighing is not to embrace more than the given number of working days, counting both those on which mails are conveyed and those on which they are not, the object being the same as in the other case."

On September 18, 1884, Postmaster-General W. Q. Gresham issued order No. 44, as follows:

"That hereafter when the weight of mails is taken on railroad routes performing service seven days per week *the whole number of days the mails are weighed*, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day."

Postmaster-General Gresham retired in October, 1884. Postmaster-General Frank Hatton, who succeeded him, submitted the question to the Attorney-General, his letter and the reply thereto being as follows:

"OCTOBER 22, 1884.

"SIR: The act of March 3, 1873 (17 Stat., p. 558), regulating the pay for carrying the mails on railroad routes provides * * * 'that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of 200 pounds, $50; 500 pounds, $75; 1,000 pounds, $100; 1,500 pounds, $125; 2,000 pounds, $150; 3,500 pounds, $175, etc., * * * ; the average weight to be ascertained in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, * * * .'

"Upon a large number of the railroad routes mails are carried on six days each week—that is, no mails are carried on Sunday. On others they are carried on every day in the year.

"It has been the practice since 1875 in arriving at the average weight of mails per day on these two classes of service to treat the 'successive working days' as being composed of the six working or secular days in the week, which is explained by the following illustrations:

"Two routes, No. 1 and No. 2, over each of which 313 tons of mail are carried annually.

"On route No. 1 mails are carried twice daily except Sunday, six days per week, and are weighed for thirty successive working days, covering usually a period of thirty-five days. *The result is divided by 30 and an average weight of mails per day* of 2,000 pounds is obtained.

"Transportation per mile of road per annum, 1,252 miles.

"Weight per mile of road per annum, 313 tons.

"Pay per ton per mile of road per annum, 37.92 cents.

"Pay per mile run, 11.9 cents.

"Rate of pay allowed per mile per annum, $150.

"On route No. 2 mails are carried twice daily, seven days per week, and are weighed for thirty successive working days and for the intervening Sundays, the weight on the Sundays being treated as if carried on Mondays, the weighing, as before, covering usually a period of thirty-five days. The result is divided by 30 and an average weight of mails per day of 2,000 pounds is obtained.

"Transportation per mile of road per annum, 1,460 miles.

"Weight per mile of road per annum, 313 tons.

"Pay per ton per mile of road per annum, 47.92 cents.

"Pay per mile run, 10.2 cents.

"Rate of pay allowed per mile per annum, $150.

"I have thought it necessary to give the foregoing illustrations in order that the practice of this Department under the law cited may readily appear, and I will thank you to advise me whether that practice is in compliance with or in violation of the statute. If not in conformity with the law, will you please indicate the correct method by which the

average weight per day should be obtained and the compensation adjusted thereon?

"Very respectfully,

"FRANK HATTON,
"*Postmaster-General.*

"Hon. B. H. BREWSTER,
"*Attorney-General, Department of Justice.*"

"DEPARTMENT OF JUSTICE,
"*October 31, 1884.*

"SIR: I have considered your communication of the 22d instant, requesting to know whether the construction placed by the Post-Office Department on section 4002, subordinate section 2, prescribing the mode in which the average of the weight of mails transported on railroad routes shall be ascertained, is correct, and am of opinion that that construction is correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment.

"I have the honor to be, your obedient servant,

"S. F. PHILLIPS,
"*Acting Attorney-General.*

"The POSTMASTER-GENERAL."

The above letter from the Acting Attorney-General is taken from Opinions of Attorney-General, Vol. XVIII, page 71. While it is there stated that it was signed by S. F. Phillips, the original, received at the Post-Office Department, is signed by William A. Maury.

Postmaster-General Gresham's order was revoked January 16, 1885. This order had evidently in view the same purpose as order No. 165.

We have here, then, a case where the practical interpretation placed upon the act of Congress of March 3, 1873, in regard to obtaining the daily average weight of mail upon railroad routes by the Post-Office Department has been, except for a few months, unbroken for thirty-five years, although its correctness was authoritatively challenged. It also appears that while Congress in 1876 and 1878 and again in 1907 provided for a reduction in the maximum rates established by the act of March 3, 1873, it made no change in the provision as to obtaining the average

weight. It further appears that in 1905 Congress reenacted that provision in exactly the same language, except that "ninety" was substituted for "thirty."

Moreover, it should be noted that the post-office appropriation bill (H. R. 25483) reported to the House on February 6, 1907, provided:

"The Postmaster-General is hereby authorized and directed to readjust the compensation to be paid from and after the 1st day of July, 1907, for the transportation of mails on railroad routes carrying their whole length an average weight of mails per day of upward of 5,000 pounds by making the following reductions from the present rates per mile per annum for the transportation of mails on such routes: On routes carrying their whole length an average weight of mails per day of more than 5,000 pounds and less than 48,000 pounds, 5 per cent; 48,000 pounds and less than 80,000 pounds, 10 per cent; and $19 additional for every additional 2,000 pounds: *Provided*, That hereafter the average weight per day be ascertained, in every case, by the actual weighing of the mails for such a number of successive days, not less than one hundred and five, at such times and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster-General may direct: *Provided, further*, That hereafter, at the time of the weighing of the mails at the periods required by law, empty mail bags shall not be weighed nor taken as any part of the total weight of the mails in estimating the pay for transportation of said mails."

The accompanying report from the Committee on the Post-Office and Post-Roads and two minority reports discussed the question very fully and showed clearly the intention on the part of the committee, that, in the words of its report:

"In computing the average weight of mail carried per day, the whole number of days such mail may be weighed shall be used as the divisor."

On February 20, 1907, while the House in committee of the whole was considering the Post-Office bill, the follow-

ing amendment was offered by Mr. Murdock to follow the provision "For inland transportation by railroad routes, $44,660,000:"

"*Provided*, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of days such mails have been weighed."

A point of order was made against this amendment on the ground that it changed existing law. The Chair sustained the point, observing (41 Cong. Rec., 3471):

"The CHAIRMAN. The existing law has received a construction by the officers charged with the duty of administering it, and that construction the Chair feels bound to follow. The proposed amendment changes existing law as construed by the proper officer, by changing the divisor. This is in the guise of a limitation, but it has been held over and over again here that a limitation is negative in its nature and may not include positive enactment establishing rules for executive officers. It has been held further that while limitation may provide that a part of an appropriation shall not be used except in a certain way, yet the restriction of executive discretion may not go to the extent of an imposition of new duties. And the limitation on the discretion exercised under the law by a bureau of the Government is a change of existing law. The decisions on the question of limitation, the attempt to draw a well-defined distinction between changes of existing law and a proper limitation, are among the most difficult questions that the Chair is ever called upon to decide."

Upon appeal from the decision of the Chair, its ruling was sustained. (Id., 3472.)

Later on the same day the provision of the bill above quoted directing the Postmaster-General to readjust the compensation to be paid from and after July 1, 1907, for the transportation of the mails on railroad routes, which included the proviso "that hereafter the average weight per day be ascertained, in every case, by the actual weighing of the mails for such a number of successive days," etc. (the

word "working" being omitted), also went out upon a point of order. (41 Cong. Rec., 3473.) Subsequently, on the same day, the rules were suspended and this provision, without the proviso as to obtaining the average, was inserted and became the law. (Id., 3494.)

The principles of law bearing upon the solution of the matter under consideration in this aspect are settled by decisions of the Supreme Court of the United States.

It has been held that where the meaning of a statute is doubtful or ambiguous, the practical construction placed upon it by the Department of the Government charged with its administration, if contemporaneous, uniform, and long continued, although not deemed controlling on the courts, is to be treated with respect and will ordinarily be followed. (*Brown* v. *United States*, 113 U. S., 568; *United States* v. *Philbrick*, 120 U. S., 52: *Robertson* v. *Downing*, 127 U. S., 607; *United States* v. *Alabama R. R. Co.*, 142 U. S., 615.)

In the last-mentioned case, which involved the question of compensation to railroads for carrying the mails, the court said (p. 621):

"* * * It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced."

But the true scope of this principle is illustrated by a considerable number of cases in which the court has refused to adopt the departmental construction of a statute. In these cases the court has said that such departmental construction is without weight where the statute is clear and explicit and free from ambiguity or doubt. (*Swift Co.* v. *United States*, 105 U. S., 691, 695; *United States* v. *Graham*, 110 U. S., 219, 221; *United States* v. *Tanner*, 147 U. S., 661, 663; *United States* v. *Alger*, 152 U. S., 384, 397; *Studebaker* v. *Perry*, 184 U. S., 258, 268–269.)

In *Swift Co.* v. *United States*, the court says (p. 694):

"There is no serious question raised as to the proper con-

struction of the internal-revenue acts upon the point, it being virtually admitted that the contention on the part of the appellant upon the provisions of the statutes is correct.

"It is met, however, in the opinion of the Court of Claims, and in argument on behalf of the Government here, that the contrary construction, to pay these commissions in stamps at their face value, has been acted upon by the Commissioner of Internal Revenue from the beginning; has been asquiesced in by purchasers and dealers; and has never been changed by Congress; and as an official practice has thus acquired the force of law; or if not, then, at least, it was a course of dealing well known to the appellant, and acquiesced in, by which it accepted stamps at their face value in payment of its commissions, which it is not at liberty now to open, question, and reverse.

"The right construction of the internal-revenue acts, upon the point of the allowance of commissions to dealers in proprietary articles, purchasing stamps made from their own dies, and for their own use, is too clear to bring the case within the first alternative. The rule which gives determining weight to contemporaneous construction, put upon a statute, by those charged with its execution, applies only in cases of ambiguity and doubt. (*Edward's Lessee* v. *Darby*, 12 Wheat., 206; *Smythe* v. *Fiske*, 23 Wall., 374; *United States* v. *Moore*, 95 U. S., 760; *United States* v. *Pugh*, 99 id., 265.")

In *United States* v. *Alger*, the court says:

"If the meaning of that act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears, to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect. (*Swift Co.* v. *United States*, 105 U. S., 691, 695; *United States* v. *Graham*, 110 U. S., 619; *United States* v. *Tanner*, 147 U. S., 661.)"

In so far as this question is affected by the practice of the Post-Office Department standing alone, I think it comes fully within the principle laid down in the two cases lastly above cited. The law says the average weight shall be ascertained "by the actual weighing of the mails for

* * * successive working days." The practice has been to weigh on Sundays, and yet, when the average is to be ascertained, Sundays are excluded from the divisor. This practice is not only clearly erroneous, but logically indefensible. If Sundays are not "working days," the law does not permit the mails to be weighed on Sundays. If they are "working days," their exclusion from the divisor renders the result of the computation false on its face. It may be conceded that the question whether "working day" is to be interpreted "week day" in this provision of the statute is not free from doubt, and, if the practice of the Post-Office Department were consistent with one construction and inconsistent with the other, there might be room to apply the doctrine of Brown's and Philbrick's cases; but as it is consistent with neither, and can be defended, if at all, only by reading the words in one sense for one purpose and in another sense for another purpose, there is no room for the application of any such doctrine.

The practice seems to have constituted, in fact, a sort of administrative legislation intended to encourage the carrying of the mails on Sundays, and the most serious difficulty connected with the subject is to determine whether there has not been a legislative sanction of the practice by the Congress in its failure to change the method of computation when it reenacted the statute in 1905, for there can be no question that the practice of the Department in this respect was, or might have been, well known to the Congress, by reason of very full statements concerning it in public documents.

In *Dollar Savings Bank* v. *United States* (19 Wall., 227), the court refused to hold that the Congress, by the reenactment of a statute, had adopted the construction placed upon it by the department of the Government charged with its administration. The statute under consideration in that case (act of Congress of July 13, 1866, 14 Stat., 138) provided:

"That there shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due, wherever and whenever the same shall be payable, to stockholders, policy holders, or depositors, or

parties whatsoever, including nonresidents, whether citizens or aliens, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or Territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds; and said banks, trust companies, savings institutions, and insurance companies shall pay the said tax, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid the said tax of five per centum. * * * *Provided*, That the tax upon the dividends of life insurance companies shall not be deemed due until such dividends are payable; nor shall the portion of premiums returned by mutual life insurance companies to their policy holders, nor the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions, be considered as dividends."

It was contended that savings institutions were relieved from taxation by the proviso to this section, but the court held otherwise, and in reply to the argument based upon the practical construction placed upon the act, said (pp. 236–237):

"Our attention has been called to the fact that in 1867, and again in 1870, the Commissioners of Internal Revenue construed the proviso as exempting savings institutions from the tax upon all sums added to their surplus or contingent funds, and that the act of Congress of July 14, 1870, which reduced internal taxation, employed substantially the same language respecting savings banks as that contained in the act of 1866. In view of this, the plaintiffs in error argue that Congress required the Commissioner to prescribe what returns savings banks should make; that this made it his duty to put a construction on the law; that he did so, and held that such institutions were not required to return undistributed earnings carried to a surplus fund, and that after this practical construction

had been made and acted upon more than three years, Congress reenacted the tax, reduced in amount, in the same words. Hence, it is inferred, the construction given by the Commissioner was adopted. It is, doubtless, a rule that when a judicial construction has been given to a statute, the reenactment of the statute is generally held to be in effect a legislative adoption of that construction. This, however, can only be when the statute is capable of the construction given to it, and when that construction has become a settled rule of conduct. The rule, we think, is inapplicable to this case. In the first place, the decisions of the Internal-Revenue Commissioner can hardly be denominated judicial constructions. That officer was not required by the law to prescribe what returns savings banks were required to make. That was prescribed by the act of Congress itself, and he had no power to dispense with the requisition. There is, therefore, no presumption that his decisions were brought to the knowledge of Congress when the act of 1870 was passed. And again, the construction he gave is an impossible one, for, as we have seen, it makes the proviso plainly repugnant to the body of the section.

"We are constrained, then, to hold that the act of Congress does impose upon the plaintiffs in error the tax to recover which the present suit was brought."

This opinion would probably be decisive of the present question were it not for some more recent decisions of the court. In *New York, New Haven and Hartford R. R. Co.* v. *Interstate Commerce Commission* (200 U. S., 361, 399), it was contended that the prohibition of the act to regulate commerce and its amendments against undue preferences and discriminations, ought not to be interpreted as applying against a carrier who was a dealer in commodities "because of an administrative construction long since given to the act by the Interstate Commerce Commission, the body primarily charged with its enforcement, and which has become a rule of property affecting vast interests which should not be judicially departed from, especially as such construction, it is asserted, has been impliedly sanctioned by Congress by frequently amending

the act without changing it in this particular." The court said on this point (p. 401):

"* * * A construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, *when not plainly erroneous*, must be treated as read into the statute. Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight and was not lightly to be interfered with."

These remarks were, strictly speaking, *obiter dicta*, for the Court said immediately afterwards:

"The concessions thus made, however, are wholly irrelevant to the case before us."

In the case of *United States* v. *Falk & Bro.* (204 U. S., 143), however, the court seems to have come very near to qualifying the decision in *Dollar Savings Bank* v. *United States*, above cited. In that case the Government contended that the practical construction given by the Executive Department to a proviso in the tariff act of 1890 should control the interpretation of a similar proviso in the tariff act of 1897, and the court sustained that view, saying (p. 152):

"This, then, is our view: The Attorney-General having construed the proviso of section 50 of the act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of section 33 of the act of 1897 and intended to make no other change than to require as the basis of duty the weight of the merchandise at the time of entry instead of its weight at the time of its withdrawal from warehouse."

This aspect of the question has caused me some measure of doubt, but, upon careful consideration, I do not think it falls within the principle of the case last cited. The construction supposed to have been placed upon the statute in the practice of the Post-Office Department is not only "plainly erroneous," like the case suggested as an exception by the court in 200 U. S., 361, but is "an impossible one" as was that rejected by the court in 19 Wall., 227. There is nothing to show that the construction by the Attorney-General sustained in the Falk case seemed to the court either "plainly erroneous" or impossible." It must be furthermore remembered that in reenacting the statute in 1905, as in enacting it in 1873, the Congress only fixed a *minimum* to the number of days on which the Postmaster-General *must* have the mails weighed; he remained, as he had been previously, entirely at liberty to increase their number in his discretion, and he might therefore, as above noted, have made the weighing period extend through the entire year, or have supplemented the weighing by computations which would render practically nugatory the construction supposed to be involved in the practice. In other words, in 1905 the Congress may have felt justified in awaiting an administrative remedy for a faulty administrative practice, and have only thought seriously of a legislative remedy two years later. The opinion purporting to have been given by Solicitor-General Phillips on October 31, 1884, is not only, as above stated, irregular in form, but so meager and inadequate in its statement and discussion of the questions involved, that I can not recognize it as binding upon me in the premises. As to the decision of the chairman of the committee of the whole, sustained upon appeal, to the effect that the proposed amendment requiring a divisor "not less than the whole number of days such mails have been weighed," made a change in existing law, I am not aware of any precedent holding such a decision to be binding upon this Department. The decision may be held, moreover, to have been correct, without regard to the "construction" alleged by the chairman to have been placed upon the law by "the proper officer."

It follows from what I have said that I consider the form or method in which the information obtained from weighing the mails in accordance with the act of March 3, 1905, shall be utilized, a matter in your discretion, provided your action shall be directed to the ascertainment of what, according to your best judgment, would be an average weight as nearly true as may be practicable *per* day *during a year* of the mails carried as the statute lastly aforesaid directs, to be used as a basis for a yearly compensation to the carrier. Of course the adequacy of such compensation is for the Congress, not for the Postmaster-General. Each of the two orders first-above mentioned constituted therefore, in strictness, a legal exercise of a discretion vested by law in the Postmaster-General. If, however, no further calculation is to be made beyond the addition of ascertained weights and division by the divisor selected, it seems obvious that order No. 165 may lead to arbitrary and inequitable results. Order No. 412, upon the same assumption, will give, as the average weight *per* day during a year, the said average weight *per* day during somewhat more than one-fourth of a year; and there is no reason to suppose its results will be unjust or have any greater inaccuracy than is authorized and contemplated by the act of 1905.

Yours, respectfully,

CHARLES J. BONAPARTE.

The POSTMASTER-GENERAL.

IMMIGRATION—GERONIMO GARCIA—PROMISE OF EMPLOYMENT MADE BY STATE OFFICER.

An alien who arrived at New Orleans from Cuba on August 5, 1907, his passage money having been paid by an agent of the Louisiana State board of agriculture and immigration out of funds appropriated by that State, the agent having assured the alien of employment upon his arrival, which assurance operated as a material, if not the principal, inducement to his immigration, the expectation being that the employer will loan the alien the sum so advanced for the reimbursement of the State,—is not entitled to admission to the United States.

The classes of aliens excluded by section 2 of the act of February 20, 1907 (34 Stat., 898), include "aliens solicited or induced to immigrate by reason of offers or promises, even if there is no contract of employment." (26 Op., 199, 207.)

Section 6 of the act of 1907 contains no exceptions in favor of a State in reference to specific promises of employment to individual immigrants, nor any requirement that the promises of employment, in order to work exclusion, must be the sole inducement to exclusion.

The right of Congress to regulate the admission of aliens into the United States clearly controls the action of any State agent in this respect. (26 Op., 180.)

While the payment of an immigrant's passage out of State funds does not of itself require his exclusion, yet such payment operates to throw upon the immigrant the burden of showing that he does not come within any of the otherwise excluded classes, such as paupers, etc., specifically excluded by the act.

The merely hypothetical possibility of a condition arising under the indirect method of attempting to eventually secure reimbursement to the State fund of the amount of the alien's passage, which could perhaps be regarded as in effect a payment of his passage by a corporation, society, or association, would not be a ground of exclusion.

DEPARTMENT OF JUSTICE,
September 30, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of the 26th instant in reference to the appeal of Geronimo Garcia, who has been excluded from the United States by a decision of the board of special inquiry at the port of New Orleans, in a test case brought by the Louisiana State board of agriculture and immigration, in which you recite the facts brought out by the testimony and request an expression of my opinion as to whether the admission of an alien to the United States under the circumstances thus recited would be in violation of the immigration act of February 20, 1907.

The facts as stated by you are as follows:

"Geronimo Garcia arrived at the port of New Orleans from Cuba on August 5, 1907. His passage was paid by Mr. Reginald Dykers, who at the time was the regularly authorized agent of the Louisiana State board of agriculture and immigration, out of funds appropriated in regular manner by the State legislature. Mr. Dykers and a

Mr. L. H. Allen, the latter also being a representative of the said board, approached the alien in Habana and solicited him to immigrate to the State of Louisiana, assuring him that employment as a farm laborer would be secured for him on his arrival in said State. In exchange for the passage money the alien gave to the said officials a receipt, in which he promised to return to the Louisiana State board of agriculture and immigration within a year the sum so advanced. It is the expectation of the State agent that in such cases, upon the alien's securing employment, his employer will loan him the amount necessary to reimburse the State and deduct the same from his wages; but no method has been provided whereby an employer can be compelled to make such loan, it being the intention of the State board to rely upon the moral obligation of the alien's promise to reimburse the State, and not upon any legal measures against him or his employer. The alien is left free to select such employer as he pleases, although the expectation of the agent is that aliens selected by him under this plan will be of such a reliable class that they will usually seek employment from parties who can be depended upon to advance to the alien the amount of the passage and enable him to therewith reimburse the State fund. It also appears that, while the alien Garcia had seen advertisements published abroad by the Louisiana State board of agriculture and immigration, reciting the inducements the State of Louisiana offers for immigration thereto, he was not induced to come to the United States solely by reason of such inducements; nor was the sole inducement the fact that his passage was paid by another, nor the fact, brought out in the testimony, that his father had previously come to this country. These facts operated to some extent, however, to lead him to endeavor to avail himself of the assurances given by the above-named agents that employment as a farm laborer would be secured for him on his landing in Louisiana.

"Although the desire of the State agent is that Garcia, if landed, shall enter the employ of an *individual* planter who would be willing to loan him the cost of his passage and gradually deduct it from his wages, thus enabling said

alien to immediately reimburse the State fund, he is, as above stated, left free to accept other employment if he so desires; and there is no evidence that shows positively that the said Garcia (or any other alien imported in accordance with the plan) might not, after landing, be employed by a corporation, association, or society as freely and in the same manner as by an individual; suggesting a possibility that, under the indirect method of attempting to eventually secure reimbursement to the State fund of the amount of the alien's passage, a condition could arise which might, perhaps, be regarded as being, remotely but yet in effect, a payment of such passage by a corporation, society, or association."

Upon these facts I am of the opinion that Garcia is not entitled to admission into the United States.

1. It appears from this statement that representatives of the Louisiana State board approached Garcia in Havana and solicited him to immigrate to Louisiana, assuring him that employment as a farm laborer would be secured for him on his arrival, and that such assurances operated as a material, if not the principal, inducement to his immigration, since neither the advertisements published by the State, nor the payment of his passage, nor his father's previous coming, was the sole inducement to his coming, but these matters operated to some extent to lead him to endeavor to avail himself of the assurances of employment given him by the representatives of the State board.

Among the classes of aliens excluded by section 2 of the act of 1907 (34 Stat., 898) are: "Persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled." This provision, as stated in my opinion rendered the President on March 20, 1907, excludes "aliens solicited or induced to immigrate by reason of offers or promises, even when there is no contract of employment." (26 Op., 199, 207.)

The assurances given to Garcia by the State agents constitute, in my opinion, promises of employment within the

inhibition of the statute. While it is provided that aliens coming to this country in consequence of advertisements by a State of its inducements to immigration shall not be treated as coming under a promise of employment (sec. 6), there is no exception in favor of a State in reference to specific promises of employment to individual immigrants such as were held out to Garcia by the representatives of the State board. Neither is there any requirement in the act that the promises of employment in order to work exclusion must be the sole inducement to the immigration.

Therefore, since as stated in my opinion rendered the President on March 6, 1907, the unquestionable right of Congress to regulate the admission of aliens into the United States clearly controls the action of any State agent in this respect (26 Op., 180, 193), it follows that on account of the assurances of employment that were given to Garcia as an inducement to his immigration, he should be excluded from admission.

2. Furthermore, as his passage was paid out of State funds, unless it was also clearly shown that he did not belong to any of the classes, such as paupers, etc., specifically excluded by the act, he comes within the provision of section 2 of the act (34 Stat., 898) excluding "any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes, and that said ticket or passage was not paid for by any corporation, association, society, municipality, or foreign government, either directly or indirectly." Under this provision, while the payment of an immigrant's passage out of State funds does not of itself require his exclusion, yet such payment by a State, just as by an individual, operates to throw upon the immigrant the burden of clearly showing that he does not come within any of the otherwise excluded classes, and in case of his failure to so show he is not entitled to admission.

3. In reference to your suggestion that, under the indirect method of attempting to eventually secure reimbursement to the State fund of the amount of the alien's pas-

sage, a condition might arise which could perhaps be regarded as in effect a payment of his passage by a corporation, society, or association, as the statement of facts does not show that any such condition actually exists, or that his passage money is in fact to be so repaid, I am of the opinion, without passing upon the question as to what would be the effect of such a condition if it did arise, that the mere hypothetical possibility of such a condition would not be a ground of exclusion.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF COMMERCE AND LABOR.

COAL FOR NAVY—TRANSPORTATION IN FOREIGN VESSELS.

Section 4347, Revised Statutes, and the act of February 17, 1898 (30 Stat., 248), which prohibit the transportation of merchandise from one domestic port to another in vessels owned by foreigners, "under penalty or forfeiture thereof," do not apply to property owned by the Government.

A prohibition in a statute of general application does not extend to, or affect, the sovereign, unless its language requires that such a meaning shall be given to it. The sovereign authority of the country is not bound by the words of a statute, unless named therein. (20 Wall., 251.)

Coal for the use of the Navy may, under existing law, be transported by sea from ports on the Atlantic to ports on the Pacific coast of the United States in vessels of foreign registry where sufficient American vessels for that purpose can not be had, or where the charges made by such vessels are excessive and unreasonable.

The forfeiture of such coal would merely vest the title thereto in the United States, and the Government would thereby merely acquire title to something which it already owned.

The act of April 28, 1904 (33 Stat., 518), which provides that the War and Navy Departments shall in general employ vessels of the United States for the transportation of coal and other supplies purchased for the use of the Army or Navy, provided the rates charged are not excessive or unreasonable, contemplates the possibility that it may be impossible to comply with its terms without exposing the Government to exorbitant and unreasonable expense.

This statute does not expressly cover the contingency that there might be no American vessels obtainable at any cost, but in such a case the rule of a reasonable construction of all legislative acts applies, and there would be the same right to employ other means of transportation as is expressly granted where American vessels can be procured, but only at excessive cost to the Government.

Whenever the President shall determine, as provided by the act of 1904, that the rates of freight charged by American vessels for the transportation of coal or other supplies purchased for the use of the Navy are excessive or unreasonable, the Navy Department is authorized to procure such transportation through free competition, open to both American and foreign shipowners.

The preference granted by this act is to be construed as a privilege to be claimed by American shipowners, which provision is inoperative if not claimed under the conditions prescribed by the law itself.

DEPARTMENT OF JUSTICE,
October 3, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of October 1. In this you ask my opinion upon the question whether the prohibitions of section 4347, Revised Statutes, and the act of February 17, 1898 (30 Stat., 248), refer to property owned by the Government, and whether, under existing laws, coal for the use of the Navy may be transported by sea from ports on the Atlantic to ports on the Pacific coast of the United States in vessels of foreign registry, provided it appears, as a matter of fact, that sufficient American vessels to transport such coal can not be had, or that the charges made by such vessels are excessive and unreasonable. Section 4347 of the United States Revised Statutes, so far as material to the foregoing questions, is as follows:

"No merchandise shall be transported under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power."

By the act approved February 17, 1898 (30 Stat., 248), this portion of the above-mentioned section was amended so as to read as follows:

"That no merchandise shall be transported by water under penalty of forfeiture thereof from one port of the United States to another port of the United States, either

directly or via a foreign port, or for any part of the voyage, in any other vessel than a vessel of the United States."

You ask whether the prohibition contained in this statutory provision extends to merchandise which constitutes "property owned by the Government." It is a well-settled principle of statutory construction that a prohibition of this character does not extend to, or affect, the sovereign, unless its language requires that such a meaning shall be given to it. This rule is thus stated in Bacon's Abridgment, title "Prerogative," 3–5: "Where a statute is general, and thereby any prerogative, right, title, or interest is vested or taken from the King, in such case he shall not be bound unless the statute is made by express words to extend to him." This rule has been fully adopted with respect to the United States. (*U. S.* v. *Knight*, 14 Peters, 301; *U. S.* v. *Herron*, 20 Wallace, 251,255.) In the last-mentioned case the Supreme Court says it is "the settled rule of construction that the sovereign authority of the country is not bound by the words of a statute, unless named therein." If, therefore, there had been nothing in the language of this statute to indicate whether it was or was not intended to apply to merchandise owned by the United States, the rule of construction to which I have referred would require that it be held not to have such application. There is, however, in the statute itself language which, in my opinion, is decisive of this question. Both section 4347 and the act of 1898 prohibit the transportation of merchandise from one domestic port to another in vessels owned by foreigners "under penalty of forfeiture thereof." A forfeiture in such case divests the title of the owner of the property forfeited, and vests this title in the Government. If the merchandise subject to forfeiture already belongs to the Government it is obvious that the proceeding would be altogether nugatory and futile. The Government would acquire by it title to something which it already owned, and the offender—that is to say, the United States itself—would be in precisely the same position in which it was prior to the infliction of the penalty. Under these circumstances it seems quite clear to me that, even without a

resort to the rule of construction to which I have referred, the provisions of this law must be construed as inapplicable to merchandise owned by the United States. I answer, therefore, your first question in the negative, and advise you that, in my opinion, the provisions of section 4347, United States Revised Statutes, and of the act approved February 17, 1898, do not apply to property owned by the Government.

In reply to your second question, I advise you that its subject-matter appears to be covered by the act approved April 28, 1904 (33 Stat., 518). The relevant portion of this statute is as follows:

"That vessels of the United States, or belonging to the United States, and no others, shall be employed in the transportation by sea of coal, provisions, fodder, or supplies of any description, purchased pursuant to law, for the use of the Army or Navy *unless the President shall find that the rates of freight charges by said vessels are excessive and unreasonable*, in which case contracts shall be made under the law as it now exists: *Provided*, That no greater charges be made by such vessels for transportation of articles for the use of the said Army and Navy than are made by such vessels for transportation of like goods for private parties or companies."

It will be observed that this law makes it the duty of the War and Navy Departments to employ, in general, vessels of the United States, and no others, for the transportation of coal and other supplies purchased for the use of the Army or Navy. Of course, if the Congress had seen fit by this statute to prohibit the transportation of supplies for the Army or Navy in foreign vessels absolutely, under all circumstances, without exception and without regard to the consequences, any and all such shipments would be illegal, but the law provides that if the President shall find "that the rates of freight charged by said vessels are excessive and unreasonable * * * contracts shall be made under the law as it now exists." It is obvious, therefore, that the statute contemplates the possibility that it may be impracticable to comply with its terms without exposing

the Government to exorbitant and unreasonable expense, and it is intended, in such event, that even the particular terms of the prohibition shall not prevent the transportation of articles evidently necessary for the maintenance and efficiency of the national forces. The contingency that there might be no American vessels obtainable at any cost, however great, to transport the articles in question is not expressly covered by the terms of the exception; but in view of the evident purpose of the statute, which was plainly to encourage the development of American shipping, and the grave consequences which might ensue from a failure to supply the Army or Navy with fuel, food, or munitions, of war, we are entitled and, indeed, obliged, in my opinion, to apply in this case the rule that a reasonable construction must be applied to the interpretation of all legislative acts, and, therefore, that when no American vessels can be procured, even by the payment of unreasonable and exorbitant charges, there is the same right to employ other means of transportation which is expressly granted when such vessels can be procured but only at an excessive cost to the Government.

It remains to be seen what are the means of transportation open to the Navy Department if the President shall determine that the rates of freight charges by American vessels are excessive and unreasonable. The statute says that "contracts shall be made under the law *as it now exists*"—that is to say, under the law as it existed prior to April 28, 1904. This language, so far as it affects the Navy, would seem to refer to section 3718, United States Revised Statutes, which is as follows in so far as relevant:

"All provisions, clothing, hemp, and other materials of every name and nature, for the use of the Navy, *and the transportation thereof*, when time will permit, shall be furnished by contract, by the lowest bidder."

This provision is codified, with a slight change of language, from the act approved March 3, 1843 (5 Stat., 617), and it would seem to be the only provision of law directly applicable to the transportation of supplies for the Navy. It is obvious that nothing in the language of this statute

restricts the competition for which it provides to vessels of American ownership, and I therefore reach the conclusion that when the President shall find the facts he is required to pass upon by the terms of this statute the Navy Department is authorized to procure transportation for coal or other supplies which it may purchase for the use of the Navy, through a free competition, open to both American and foreign shipowners.

It is to be observed in this connection, as showing that the preference to be accorded American vessels was not intended to prevent the employment of ships owned by foreigners in certain contingencies, that this preference is subject to an affirmative condition, namely, that the vessels claiming it must not discriminate against the Government in their charges, as these are compared with rates of freight established for private shippers; so that the statute would not be operative at all if the American vessels available for transportation charged less to private shippers for the like service than they did to the Government. It seems obvious, therefore, that the preference granted by this statute is to be construed as a privilege to be claimed by American shipowners, and which is inoperative if not claimed under the conditions prescribed by the law itself.

With the above qualifications, I answer your second question in the affirmative. I therefore advise you that, in my opinion, the prohibitions of section 4347, United States Revised Statutes, and of the act of February 17, 1898, do not refer to property owned by the Government, and that under existing laws coal for the use of the Navy may be transported by sea from ports on the Atlantic to ports on the Pacific coast of the United States in vessels of foreign registry under the circumstances stated in your letter if these shall be found by the President.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE NAVY.

NATIONAL FOREST RESERVE—CONSERVATION CHARGE FOR USE OF LANDS OR RESOURCES.

The Secretary of Agriculture is authorized by the act of February 15, 1901 (31 Stat., 790), to make the granting of permits for the use of lands or resources within the national forest reserves for the purposes contemplated by that act, which include irrigation, mining, and quarrying, etc., dependent upon the payment of such charges as he may deem reasonable.

Whether charges based upon the grounds specifically enumerated by the Secretary of Agriculture, to wit, the use of the ground and rights of way without regard to their special value for the particular purposes contemplated by the permit, and for "conservation," being the special value of the land for the particular purpose contemplated in excess of its value for general purposes,—would or would not be reasonable, is not a question which can properly be determined by the Attorney-General.

Intimated, that the right to use water on the forest reserves can be secured only under the provisions of the act of June 4, 1897 (30 Stat., 35) and of other legislation specifically referring to the reserves, unless such rights existed before the particular reserve in question was created.

DEPARTMENT OF JUSTICE,
October 5, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of August 13 last past, requesting an opinion from me in regard to your authority to make a "conservation charge" as a condition for permits to use lands or resources within the limits of the national forest reserves. The specific questions propounded by you are whether you have authority, in making such charges, to include a reasonable compensation—

"1. For the use of the ground occupied by any reservoirs, diverting dams, or power stations, according to their area, without regard to its special value for the particular purpose contemplated by the permit.

"2. For the right of way for any canal, flume, pipe, or pole line, according to its length, without regard to its special value for the particular purpose contemplated by the permit.

"3. For 'conservation,' by which is meant all other advantages, opportunities, resources, or services furnished by

the Government to the permittees, or damage suffered by it through the enjoyment of the permit; or, in other words, the special value of the land occupied by the permittee for the particular purpose contemplated by the permit in excess of its value for general purposes."

These permits are authorized by the act of February 15, 1901 (31 Stat., 790), of which the material portion is as follows:

"*The Secretary of the Interior * * * is authorized and empowered, under general regulations to be fixed by him, to permit* the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber and lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder of any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of title sixty-five of the

Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, or over any public land, reservation, or park."

By section 1 of the act approved February 1, 1905 (33 Stat., 628), it is provided that—

"*The Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled* 'An act to repeal the timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands."

Section 5 of the same act is as follows:

"That all money received from the sale of any products *or the use of any land or resources* of said forest reserves shall be covered into the Treasury of the United States and for a period of five years from the passage of this act shall constitute a special fund available, until expended, as the Secretary of Agriculture may direct, for the protection, administration, improvement, and extension of Federal forest reserves."

It appears to me that, in so far as the questions relevant to your inquiry are questions of law, they have been determined by the opinion of my predecessor, furnished to you on May 31, 1905 (25 Op., 470). In that opinion Attorney-General Moody says (p. 473.):

"Under the act of 1897 you are simply directed to so regulate the occupancy and use of these reservations as to insure the objects thereof and preserve the forests thereon from destruction. The act contains nothing inconsistent with the

making of a reasonable charge on account of the use of the reserves under the permit granted by you. By the act of 1905 you are to cover into the Treasury money received from the 'use of any land or resources' of the reservations, which 'shall constitute a special fund * * * for the protection, administration, improvement, and extension of the Federal forest reserves,' Any sums of money realized in this connection would thus tend to preserve the forests and insure the objects of the reservations, and it might therefore be contended that Congress, in authorizing you to regulate their use and occupation, considered the incidental question of charging for their use a proper subject to be left to your judgment and discretion. That such was the Congressional intent finds support in the fact that services somewhat analogous to compensation have been required for several years without any indication of a disapproval thereof on the part of Congress.

"Furthermore, your power to prohibit absolutely the use or occupation of any forest reserve, when such action is deemed by you essential to insure its objects and preserve the forests from destruction, would probably be unquestionable, and that the authority to prohibit carries with it the right to attach conditions to a permission is well established." (22 Opin., 13, 27.)

"In answer to your third question, therefore, I have to advise you that, in my opinion, you are authorized to make a reasonable charge in connection with the use and occupation of these forest reserves, whenever, in your judgment, such a course seems consistent with insuring the objects of the reservation and the protection of the forests thereon from destruction."

The question under consideration in that case was whether you had authority to make a reasonable charge as a condition of a permit under the act approved June 4, 1897 (30 Stat., 35), which authorized the Secretary of the Interior to—

"Make such rules and regulations and establish such service as will insure the objects of such reservations, namely, *to regulate their occupancy and use* and to preserve the forests thereon from destruction."

It will be observed that neither of these acts conferred upon the Secretary of the Interior expressly any authority to make a charge of any kind as a condition of granting the permits which they respectively authorized. It was held, however, by Attorney-General Moody that such authority was implied in the power conferred upon the Secretary by the act of 1897 to grant or refuse the permits, in his discretion, and the act of 1905 was referred to as substantially a legislative recognition of this authority on his part. If, however, the act of 1897 conferred upon the Secretary of the Interior, and, therefore, afterwards upon the Secretary of Agriculture, the authority in his discretion to require payment of a reasonable charge as a condition of issuing any such permits as are authorized by the said act, it seems to me quite clear that the act of 1901, above quoted, conveys the like authority. The language of the later act appears to me more explicit than that of the former, and the intention of the Congress to leave the privileges granted under that act revocable in the discretion of the Secretary, as is expressly stated in the last proviso, above quoted, of the act of 1901, seems to be more nearly consonant with a purpose to intrust to his discretion all matters connected with the granting of such permits than is any relevant provision to be found in the act of 1897. I conclude, therefore, that you are authorized by the act of 1901 to make the granting of permits for the purposes contemplated by that act dependent upon the payment by the persons receiving such permits of such charges as you may deem reasonable for the purposes contemplated by the law.

Whether charges based upon the three grounds specifically enumerated in your letter requesting an opinion, would or would not be reasonable, is not, under the circumstances of this case, a question proper to be determined by this Department, but a matter left by the law entirely to your discretion. In *Riverside Oil Company* v. *Hitchcock* (190 U. S., 325), referred to in the opinion of Attorney-General Moody, above quoted, the court says: "The responsibility as well as the power rests with the Secretary, uncontrolled by the courts." This would seem to be no less true as to the question presented in the present case.

It may be well for me to say, however, that I do not think it clear, as seems to be assumed in some of the papers forwarded with your letter, that no charge can be made for water used by persons to whom permits may be granted under the act approved February 15, 1901. Such persons, independently of their permits, would have no right or authority to appropriate the waters within the forest reserves; at all events, for such a purpose as the production of electric power. It is true that the Congress and the courts have recognized a right to appropriate water on the public lands under State laws or local customs, but lands within the forest reserves are not covered by general statutes referring to the public lands; and the right to use water on such reserves can be secured, it would seem, only under the provisions of the act approved June 4, 1897, and of other legislation specifically referring to the reserves, unless, perhaps, such rights existed before the particular reserve in question was created. I do not, however, consider it necessary to express a positive opinion on this subject, since I understand from your letter that you do not intend to consider the value of the mere use of the water itself in fixing the compensation to be paid as a condition of permits for its use.

I advise you, therefore, in conclusion, that, in my opinion, you have the right to make what you believe to be a reasonable charge, as a condition of issuing permits under the act of February 15, 1901, and that your determination is decisive as to what charge is, or is not, reasonable for such purpose.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF AGRICULTURE.

COAL FOR NAVY—TRANSPORTATION IN FOREIGN VESSEL—TONNAGE TAX.

The British steamship *Ferndene*, which transported coal belonging to the United States, designed for the Navy, from Newport News to San Francisco, and had no other cargo, was not a vessel having on board goods, wares, and merchandise within the meaning of

section 4219, Revised Statutes, as amended by the acts of February 27, 1877 (19 Stat., 250), and June 26, 1884 (23 Stat., 57), imposing a tax of 50 cents per ton "upon every vessel not of the United States which shall be entered in one district from another district having on board goods, wares, and merchandise to be delivered in another district."

If the *Ferndene* carried any other goods, wares, or merchandise, not the property of the Government, that portion of her cargo would be liable to forfeiture under the act of February 17, 1898 (30 Stat., 248).

DEPARTMENT OF JUSTICE,
October 9, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of October 8, 1907, inclosing one of the same date from the Commissioner of Navigation, and asking my opinion with respect to certain questions submitted regarding the British steamship *Ferndene*, which has transported coal for the Navy from Newport News to San Francisco. The questions, as stated in the letter of the Commissioner of Navigation, are substantially as follows:

1. Is the *Ferndene* exempt from the tonnage tax imposed by section 4219, R. S., as amended by subsequent legislation, by virtue of article 2 of the treaty with Great Britain, originally proclaimed to be in force December 22, 1815, and section 6 of the act approved April 27, 1816 (3 Stat., 314), enacted to give effect to the terms of that treaty?

2. Is the tonnage duty imposed by section 4219, R. S., repealed by subsequent legislation?

3. Is a British ship transporting coastwise property of the United States 'a vessel not of the United States * * * having on board goods, wares, or merchandise' within the meaning of section 4219?

4. Whether a British vessel employed under the conditions proscribed by the act approved April 28, 1904, in transporting coastwise merchandise owned by the Government, is exempt from tonnage dues not imposed on a vessel of the United States similarly employed?

5. If tonnage dues at the rate of 50 cents per ton accrue in this case, is the vessel subject to "light money," as provided by section 4225, R. S.?

It will be convenient to consider first the third of the above-mentioned questions. Section 4219, R. S., as finally amended by the act approved February 27, 1877 (19 Stat., 250), is as follows:

"Upon vessels which shall be entered in the United States from any foreign port or place there shall be paid duties as follows: On vessels built within the United States but belonging wholly or in part to subjects of foreign powers, at the rate of thirty cents per ton; on other vessels not of the United States, at the rate of fifty cents per ton. Upon every vessel not of the United States, which shall be entered in one district from another district, having on board goods, wares, or merchandise taken in one district to be delivered in another district, duties shall be paid at the rate of fifty cents per ton. Nothing in this section shall be deemed in any wise to impair any rights or privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels. On all foreign vessels which shall be entered in the United States from any foreign port or place, to and with which vessels of the United States are not ordinarily permitted to enter and trade, there shall be paid a duty at the rate of two dollars per ton; and none of the duties on tonnage above mentioned shall be levied on the vessels of any foreign nation if the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nations, so far as they operate to the disadvantage of the United States, have been abolished. In addition to the tonnage duty above imposed, there shall be paid a tax, at the rate of thirty cents per ton, on vessels which shall be entered at any custom-house within the United States from any foreign port or place; and any rights or privileges acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels shall not be impaired; and any vessel any officer of which shall not be a citizen of the United States shall pay a tax of fifty cents per ton."

By section 14 of the act approved June 26, 1884 (23 Stat. 57), and as it is amended by the acts approved

June 19, 1886 (24 Stat., 81), and April 4, 1888 (25 Stat., 80), the last clause of the foregoing section is repealed, and the application of section 4219, R. S., to the case of the *Ferndene* depends upon whether, in the words of the Commissioner of Navigation, "a vessel transporting coastwise property of the United States is a vessel having on board goods, wares, or merchandise" within the terms of the said section. I should say, by way of explanation, that I understand, from your letter, that the *Ferndene* carried *no other* cargo than the coal belonging to the United States and intended for the use of the Navy. If she had on board any other goods, wares, or merchandise, not the property of the Government, the last-mentioned portion of her cargo would be liable to forfeiture under the provisions of the act approved February 17, 1898 (30 Stat., 248). If, however, as I understand to be the case, from your letter and that of the Commissioner of Navigation, the "goods, wares, or merchandise" which she had on board consisted *only* of the coal belonging to the Government, it is my opinion that this cargo did not constitute goods, wares, or merchandise within the meaning of section 4219. In my recent opinion to the Secretary of the Navy [*ante*, p. 415] I gave my reasons for holding that property belonging to the Government was not included under the term "merchandise," as used in section 4347, R. S., and the act of 1898 lastly above quoted. The language of section 4219 is substantially identical in this respect with that of section 4347 and the act of 1898, the only difference being that the words "goods" and "wares" are added to the word "merchandise," which, in my opinion, does not affect its meaning in this respect. Moreover, the general purpose of section 4219 is clearly the same as that of section 4347, the intent of the one enactment being to discourage, and that of the other to prohibit, the use of foreign vessels in the coastwise trade. To this end, merchandise transported in such vessels from one to another port of our coast was made liable to seizure and confiscation by section 4347, whereas, by the less drastic provisions of section 4219 a special tonnage tax was to be levied upon vessels transporting such merchandise, with an obvious recognition

of the established economical principle that such tax, through the operation of the law of competition, would constitute, in last resort, a burden to be borne by the owner of the merchandise, and therefore a deterrent to the use by such owner of foreign vessels for its transportation. I held that section 4347 could not apply to merchandise belonging to the Government, since the forfeiture by the Government of its own property would be a meaningless form. The same line of reasoning leads, in my opinion, although not quite so obviously, to the same conclusion with respect to section 4219. If foreign vessels must pay this tax, they will inevitably increase their rates of freight, so as to reimburse their owners for the outlay. In the case of a private shipper this would constitute a reason why he should not employ them, and the aim of the law to encourage American shipping would be *pro tanto* attained; but, in the case of the Government, as it would receive back, in the form of tax, what it paid out in the form of increased charges for transportation, the above mentioned motive could not operate, and it is reasonable to conclude that the case was not one contemplated by the framers of the law. It follows that, in my opinion, a vessel having no other cargo than coal belonging to the United States and intended for the use of the Navy is not a vessel having on board goods, wares, or merchandise under the terms of section 4219, as amended by the acts of 1877 and 1884; and therefore that, supposing the *Ferndene* to have had no other cargo than the above-mentioned coal, she is not liable to the tonnage tax of 50 cents per ton mentioned in your letter.

The determination of this question renders it unnecessary to express any opinion as to the first, second, and fourth questions submitted, through you, by the Commissioner of Navigation. With respect to the fifth question, I understand this to be predicated upon the hypothesis that the *Ferndene* shall have been held liable to the tonnage tax. As above stated, I hold that she is not so liable, and, if I rightly understand the letter of the Commissioner of Navigation, your Department is satisfied that exemption from

such liability involves exemption from "light money" under the provisions of section 4225, R. S., as well. It is not, therefore, necessary that I should give an opinion with respect to the lastly above-mentioned section.

I remain, very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF COMMERCE AND LABOR.

SURGEON-GENERAL OF THE ARMY—CONTRACT FOR SUPPORT OF PATIENTS IN PROVIDENCE HOSPITAL.

The Attorney-General deems it inexpedient to give an opinion upon a question involving a payment which is clearly proper for the Comptroller to decide, to wit, whether under the annual appropriation for the care of patients in the Providence Hospital, Washington, D. C., the Surgeon-General of the Army may contract with that institution to pay a stipulated sum per month for keeping in a state of preparedness for 95 patients, there not being in every month an average of 95 patients in the hospital, but where the monthly average per year equals or exceeds that number of patients.

Suggested, that inasmuch as "the monthly number of patients has always, with one exception, equaled or exceeded 95, the total number for the year must have always reached an average of more than 95 for each day of the year, and therefore it is the contract, or the interpretation placed upon it, and not the statute which produces the injustice complained of.

Suggested, that a contract to pay the full amount appropriated, $19,000 (34 Stat., 1350), for an average of 95 patients per day through the year would satisfy the statute, both in letter and spirit.

DEPARTMENT OF JUSTICE,

October 14, 1907.

SIR: I have received your request of the 7th instant for my opinion upon the question whether, under an annual appropriation for care of patients in the Providence Hospital in this city, the Surgeon-General of the Army may contract to pay $1,583.33 per month for keeping in a state of preparedness for 95 patients, there not being in every month an average of 95 patients in the hospital.

You inform me that, as in April last, "the average of patients was only 88 (total hospital days for the month

2,649)," the Acting Surgeon-General felt constrained to certify the account for payment of $1,471.78 instead of one-twelfth of the annual appropriation of $19,000.

The statutory provision you desire interpreted reads as follows:

"For the support and medical treatment of ninety-five medical and surgical patients who are destitute, in the city of Washington, under a contract to be made with the Providence Hospital by the Surgeon-General of the Army, nineteen thousand dollars, one half of which sum shall be paid from the revenues of the District of Columbia and the other half from the Treasury of the United States.' (34 Stat., 1350.)"

You say that for years prior to the first passage of this provision in 1897, including the year 1896, there were annual contracts between the Surgeon-General and the hospital, engaging the hospital to keep 95 beds always in readiness and to receive all patients lawfully sent, and agreeing on behalf of the United States "to pay for the said services at the rate of $1,583.33 per month;" but you say that ever since the law in question was passed the contract has varied to the extent only that the United States agreed to pay "for the said services at the rate of 55.56 cents per day for each and every patient treated, the total amount to be paid for the service not to exceed the sum of $1,583.33⅓ per month."

You inform me that as "the average monthly number of patients has always, with one exception, I (you) believe, equaled or exceeded 95, this stipulation, so construed, has for the most part worked out substantial justice."

The one exception was in April last, when the average, as you say, was 88.

You express the view that, as even empty beds in a hospital ward have to be attended and kept clean, proper temperature maintained, service employed, etc., compensation on the basis of preparedness for 95 patients rather than upon the basis of the average number cared for would be just.

For reasons given in numerous communications from Attorneys-General concerning cases in which they prefer

not to give opinions upon questions clearly proper for decision by the Comptroller of the Treasury (25 Op., 303), I think it best not to answer your question whether the old form of contract can be used.

I may, however, suggest that, as "the monthly number of patients, has always, with one exception, equaled or exceeded 95," the total number of patients for the year must easily have always reached an average of more than 95 for each day of the year, and that accordingly, it seems to me, it is the contract or the interpretation put upon it and not the statute which produces the injustice you speak of, for the statute merely appropriates $19,000 for a year's service to 95 patients, and would be satisfied, as to both letter and spirit, by a contract to pay the whole $19,000 for an average of 95 patients per day throughout the year.

A new form of contract on that basis for the current and subsequent years would be unobjectionable.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

MATES—OFFICERS OF THE NAVY—RETIREMENT—GRADE.

Mates whose names are borne on the retired list of officers of the Navy in accordance with the act of August 1, 1894 (28 Stat., 212), are officers of the Navy, but they are neither commissioned nor warrant officers, although with respect to the law regulating retirements they are placed by the act of June 29, 1906 (34 Stat., 554), upon the same footing as warrant officers.

A person can, under the provisions of sections 1409 and 1410, Revised Statutes, be at the same time an officer of the Navy and an enlisted man, the distinction being between commissioned officers and the enlisted force.

Although commissioned officers of the Navy are appointed by the President by and with the advice and consent of the Senate, warrant officers by the President alone, and mates by the heads of departments, all are alike officers of the United States, and in accordance with the acts of 1894 and 1906, all are alike entitled to the benefits of the advancement provided for by the last-mentioned act whenever otherwise qualified.

The mates in question are entitled, in the discretion of the President, and by and with the advice and consent of the Senate, to the

benefit of the advancement provided in the case of retired officers, under the circumstances enumerated in the act of June 29, 1906 (34 Stat., 554).

While the effect of such advancement may not be to place them in a different grade, they obtain the rank and retired pay belonging to the next higher grade in that service, being that of the lowest grade of warrant officers.

DEPARTMENT OF JUSTICE,
October 15, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of October 1, 1907, in which you ask my opinion as to whether certain mates, whose names are borne on the retired list of officers of the Navy, having been placed there in accordance with the statute approved August 1, 1894 (28 Stat., 212), are entitled to advancement in accordance with the provisions of the act of June 29, 1906 (34 Stat., 554), and if so, to what grade they should be advanced. Sections 1408, 1409, and 1410 of the Revised Statutes are as follows:

SEC. 1408. "Mates may be rated, under authority of the Secretary of the Navy, from seamen and ordinary seamen who have enlisted in the naval service for not less than two years."

SEC. 1409. "The rating of an enlisted man as a mate, or his appointment as a warrant officer, shall not discharge him from his enlistment."

SEC. 1410. "All officers not holding commissions or warrants, or who are not entitled to them, except such as are temporarily appointed to the duties of a commissioned or warrant officer, and except secretaries and clerks, shall be deemed petty officers, and shall be entitled to obedience, in the execution of their offices, from persons of inferior ratings."

In the case of the *United States* v. *Fuller* (160 U. S., 593, 595) the court says:

"The personnel of the Navy is divided generally into commissioned officers, non-commissioned or warrant officers, petty officers, and seamen of various grades and denominations."

After review of the foregoing and certain other provisions of the Revised Statutes, the court further says (p. 596):

"From this summary of the Revised Statutes it appears reasonably clear:

"1. That boatswains, gunners, sailmakers, and carpenters are warrant officers to be appointed by the President, and that they are the only ones specifically mentioned as such.

"2. That mates are officers not holding commissions or warrants, and not entitled to them, but are petty officers promoted by the Secretary of the Navy from seamen of inferior grades, who have enlisted for not less than two years, and that they are distinguished from other petty officers only in the fact that their pay is fixed by statute instead of by the President."

The act of August 1, 1894, mentioned in your letter, contains the language which follows:

"That the law regulating the retirement of warrant officers in the Navy shall be construed to apply to the twenty-eight officers now serving as mates in the Navy."

It seems, therefore, to be clear (1) that the mates in question are officers of the Navy; (2) that they are neither commissioned nor warrant officers, but, with respect to the law regulating retirements, they are placed, by special statute, upon the same footing as warrant officers. I understand from your letter that they have the other qualifications required by the act approved June 29, 1906, for advancement in grade. That act provided—

"That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is borne on the official register of the Navy, and who has heretofore been or may hereafter be retired, * * * may, in the discretion of the President, * * * be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement."

The only question appears to be whether they are officers in the sense contemplated by that act. From your letter and the accompanying papers, I further understand that doubts are entertained as to whether they are such officers, because (1) as stated in the indorsement of the Bureau of

Navigation, "mates have always been considered as enlisted men," and (2) in an opinion, rendered July 22, 1907 [*ante*, p. 319], I held, in the case of Mate Richard J. Keating, that he was an enlisted man for the purpose of being permitted to reenlist with the benefit of continuous service under Article 839 of the Naval Regulations.

There is no doubt, I think, in view of the provisions of sections 1409 and 1410 of the Revised Statutes, that a person can be, at the same time, an officer of the Navy and an enlisted man. The distinction in this respect is between commissioned officers and the enlisted force. Not only is it expressly provided in section 1409 that when an enlisted man becomes a mate his duties and rights as an enlisted man remain unaffected, but the same provision is made with respect to warrant officers; and, if the fact of enlistment should be held a bar to securing the benefits of the act of 1906 in the case of mates, this might be equally true with respect to warrant officers as well. By Article 2, section 2, clause 2 of the Constitution, "Officers of the United States" can be appointed legally (1) by the President, by and with the advice and consent of the Senate; (2) by the President alone; (3) by the courts of law, or (4) by the heads of Departments. Commissioned officers of the Navy are appointed in accordance with the first method, warrant officers in accordance with the second, and mates in accordance with the fourth. All are alike officers of the United States, and, in accordance with the provisions of the acts of 1894 and 1906, above quoted, all are alike entitled to the benefits of the advancement provided for in the last-mentioned act whenever otherwise qualified. The suggestion that there is no higher grade to which mates can be advanced appears to arise from some misunderstanding as to the purpose of the law. The act of 1906 does not say that the officers in question shall be advanced to another grade, but that they shall be placed on the retired list with the rank and retired pay of one grade above that actually held at the time of retirement. On April 8, 1899, Attorney-General Griggs gave an opinion [22 Op., 433] to your predecessor with regard to the construction of section 11 of the act approved March 3, 1899, and generally known as

the "Personnel Act." In this opinion he held that, while officers of the Medical or Pay Corps could not be given a higher position in the service than that of medical director or pay director, respectively, they might have conferred upon them a higher rank and higher pay than those of the officers bearing such titles. In his words (p. 436):

"The highest officer in the Medical Corps is a 'medical director,' having the 'relative rank of captain.' It would not be possible to promote a medical director to a higher place in the Medical Corps, but it would be possible to confer upon him a higher rank than that of captain. And in my opinion that is what section 11 is intended to do. The two officers whose cases are now under discussion will be retired, respectively, as medical director and pay director, but with a higher relative rank on the retired list than that which they are entitled to in the active service—namely, rear-admiral. I see no difficulty in giving to section 11 such a construction, nor do I see any inconsistency or embarrassment that will arise in its operation."

I see no reason why this ruling should not cover the case under consideration. The mates in question will not obtain the grade of warrant officers, but they will have the rank and retired pay appurtenant to the lowest grade of such officers.

I therefore advise you that, in my opinion, the mates mentioned in your letter are entitled, in the discretion of the President, by and with the advice and consent of the Senate, to the benefit of the advancement provided in the case of retired officers under the circumstances enumerated in the act approved June 29, 1906; and, secondly, that, while the effect of such advancement may not be to place them in a different grade from that which they now hold, they will obtain the rank and retired pay belonging to the next higher grade in the service—namely, that of the lowest grade of warrant officers.

I remain, very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE NAVY.

UNITED STATES COURT IN PORTO RICO—AUDIT OF EXPENDITURES.

The new Porto Rican law concerning an audit of expenditures before disbursement is not objectionable to or inconsistent with the organic act of April 12, 1900 (31 Stat., 77), merely because it provides for an effective audit of court expenses.

That law does not transcend the legislative power of the insular government, and, whether wise or not, can not be treated as void or inapplicable to the United States court in Porto Rico.

DEPARTMENT OF JUSTICE,
October 17, 1907.

SIR: I have your letter requesting my opinion upon a question which has arisen concerning the method of accounting for the expenses of the United States court in Porto Rico, viz, whether the new Porto Rican law concerning an audit before disbursement applies to such expenses, or that court is exempt from the requirements of the law.

It is contended, I understand, that no audit is contemplated by the organic act of the court expenditures, and that an order of the judge to the marshal directing an expenditure can not be reviewed by the auditor of Porto Rico, whose duties, in this matter, are purely formal.

The organic act provides:

" SEC. 12. That all expenses that may be incurred on account of the government of Porto Rico for salaries of officials and the conduct of their offices and departments, and all expenses and obligations contracted for the internal improvement or development of the island, not, however, including defenses, barracks, harbors, light-houses, buoys, and other works undertaken by the United States, shall be paid by the treasurer of Porto Rico out of the revenues in his custody.

" SEC. 22. That the treasurer shall give bond, approved as to form by the attorney-general of Porto Rico, in such sum as the executive council may require, not less, however, than the sum of one hundred thousand dollars, with surety approved by the governor, and he shall collect and be the custodian of the public funds, and shall disburse the

same when appropriated by law, on warrants signed by the auditor and countersigned by the governor, and shall perform such other duties as may be prescribed by law, and make, through the governor, such reports to the Secretary of the Treasury of the United States as he may require, which shall annually be transmitted to Congress.

"SEC. 23. That the auditor shall keep full and accurate accounts, showing all receipts and disbursements, and perform such other duties as may be prescribed by law, and make, through the governor, such reports to the Secretary of the Treasury of the United States as he may require, which shall annually be transmitted to Congress.

"SEC. 36. That the salaries of all officials of Porto Rico not appointed by the President, including deputies, assistants, and other help, shall be such, and be so paid out of the revenues of Porto Rico, as the executive council shall from time to time determine: *Provided, however*, That the salary of no officer shall be either increased or diminished during his term of office. The salaries of all officers and all expenses of the offices of the various officials of Porto Rico, appointed as herein provided by the President, including deputies, assistants, and other help, shall also be paid out of the revenues of Porto Rico on the warrant of the auditor, countersigned by the governor.

"The annual salaries of the officials appointed by the President, and so to be paid, shall be as follows:" (Specifying the salaries of secretary, attorney-general, treasurer, auditor, commissioner of the interior, commissioner of education, insular judges, United States district judges, attorney, and marshal.)

The act gives the legislature of Porto Rico full legislative power extending "to all matters of a legislative character not locally inapplicable * * * not inconsistent with the provisions hereof."

It is contended that since section 36 says that the salaries and expenses of the offices mentioned are to be paid "on the warrant of the auditor countersigned by the governor," this excludes any further action by either officer, and that when the court orders the marshal to incur an expense the

auditor must draw and the governor must countersign the warrant without any antecedent inquiry.

But it seems to me this provision has nothing to do with the legality of an audit. It concerns the treasurer's business of payment, and no more excludes the notion of an audit than does the identical provision of section 22.

No one would contend that any of the other disbursements by the treasurer "on the warrant of the auditor countersigned by the governor" are necessarily to be paid without an audit.

I see nothing locally inapplicable or inconsistent with the organic act in the legislature's providing for an audit of these court expenditures by this auditor. Provision for this officer's appointment implies that some expenses are to be audited. The duties of this office are merely sketched by the organic act, to be filled in by the insular lawmakers. This is no less true of the offices of treasurer, attorney-general, commissioner of education, and commissioner of the interior, as to each of whom it is separately provided that he "shall perform such other duties as may be prescribed by law." Moreover, the Congress by a passage in the amendatory act of March 2, 1901 (31 Stat., 953), has indicated that the auditor of Porto Rico is to audit some court expenses. The statute reads:

"That payments of fees and expenses, heretofore made in good faith by the United States district marshal, either from funds advanced to him by the United States or by Porto Rico, may be allowed by the accounting officers of the United States or the accounting officers of Porto Rico, *as the case may be.*"

In my opinion, therefore, the new law is not objectionable merely because it provides for an effective audit of the court expenses; that is, one which will determine whether any expenditure is authorized by and in conformity with law and within the scope of the court's discretion.

Admitting, however, that the auditor of Porto Rico is to audit these court expenses, it is objected that the new Porto Rican law requiring an audit before disbursement is nevertheless void, because it must impair the usefulness of the district court, and the Congress could not have in-

tended to give the insular legislature authority to destroy that court's usefulness.

Undoubtedly such was not the intention of the organic act. But the organic act and the new law, assuming, as we should, that the latter will be properly executed, do not seem to me in conflict. The new law provides that "this section shall not be interpreted to prevent at any time the appointment of special disbursing officers for certain appropriations where, in the opinion of the auditor and upon the approval of the governor, it is deemed necessary."

The marshal can, and undoubtedly will, be advanced moneys, as a special disbursing officer, to pay witnesses and jurors and all expenses which, from their nature, must be paid without delay.

In my opinion, therefore, the law in question does not transcend the legislative power of the insular government and, whether wise or not, can not be treated as void or inapplicable.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

NAVIGABLE WATERS—DESTRUCTION OF OYSTER BEDS BY THE UNITED STATES—COMPENSATION.

The interests of private individuals or companies in oyster beds held under leases from the State of New Jersey constitute private property which can not be taken or destroyed by the United States Government for public purposes without making just compensation therefor.

The title of the State to such lands is in no wise inconsistent with its power to grant, or with the power of purchasers or other grantees to acquire, in such lands, a private property which is pecuniarily valuable and should not be taken without compensation.

There has never been a doubt that where really private property is actually taken for public use just compensation must be made therefor.

The destruction of the oyster beds in question will be a "taking" within the meaning of the Fifth Amendment to the Constitution. Actual manual caption is not necessary, nor is it essential that the Government make use of the property taken.

DEPARTMENT OF JUSTICE,
October 25, 1907.

SIR: In your letter of August 2, 1907, with its inclosures, you ask my opinion upon a case there stated, in substance, as follows:

An appropriation has been made for a channel for the improvement of Tuckerton Creek, in New Jersey, and it is claimed that the dredging of the proposed channel will destroy several private oyster beds planted, held, and owned by private individuals under leases from that State, and you ask whether, under the facts supposed, compensation must be made to the owners for the property thus taken or destroyed, and whether the right to thus take this property must be obtained by purchase or condemnation proceedings.

The question is an important one and in its ultimate analysis involves the further question whether any lands covered by navigable waters, or anything affixed to such lands, can constitute in this country private property that may not be taken by the United States for public use without compensation. For, if one kind of private property may be thus taken or destroyed, so, apparently, can any other, and the right which would authorize the destruction of an oyster bed would seem to warrant the destruction of a dock, pier, wharf, warehouse, or other structure in navigable waters, even if authorized by State law, and if originally constructed, not to the injury, but in aid of navigation. If in such submerged soil and its appurtenances there can be private property, such private property is clearly protected by the Fifth Amendment to the Constitution. Therefore, as above stated, the real question seems to be whether, in this country, there can be private property in the soil under navigable water, and I think it is settled law that this question must be answered in the affirmative.

It can not be doubted that, under the plenary power of the Congress to regulate commerce, all private property in navigable waters, whether fisheries, docks, wharves, warehouses, or other structures or rights, are subject to the paramount dominion of the Government, so that they may be taken, removed, or destroyed whenever, in the opinion of the Congress, the needs of navigation, which is an incident of commerce, may require this through the exercise of the

power of eminent domain by the Government, just as all other property may be so taken for public use. The question here is not as to the right or power of the Government to take or destroy this property, but solely as to the obligation to make compensation.

I understand that the owners of these oyster beds are all lessees from the State of New Jersey, so that their case is covered by the decision in *Hoboken* v. *Pa. R. R. Co.* (124 U. S., 656). In this case it was decided (p. 657) that:

By the law of New Jersey lands below high-water mark on navigable waters are the absolute property of the State, subject only to the power conferred upon Congress to regulate foreign commerce and commerce among the States, and they may be granted by the State, either to the riparian proprietor, or to a stranger, as the State sees fit.

On page 688 the court says:

"In the examination of the effect to be given to the riparian laws of the State of New Jersey by the act of April 11, 1864, in connection with the supplementary act of March 31, 1869, it is to be borne in mind that the lands below high-water mark, constituting the shores and submerged lands of the navigable waters of the State, were, according to its laws, the property of the State as sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce."

And on page 691 the court says further:

"Under these grants the land conveyed is held by the grantees on the same terms on which all other lands are held by private persons under absolute titles, and every previous right of the State of New Jersey therein, whether proprietary or sovereign, is transferred or extinguished, except such sovereign rights as the State may lawfully exercise over all other private property."

It has been held that while such land remains the property *of the State*, it is not protected by the Fifth Amendment to the Constitution. For this view two reasons have been given: *First*, that property of the State is not *private* property, and the Constitution refers *only* to private property. *Second*, that the title of the State is not a beneficial

one, or the subject of pecuniary compensation, but is held in trust for the public, and a taking in aid of navigation is one of the public uses for which the title was thus held. (*Stockton* v. *Baltimore and N. Y. R. R. Co.*, 32 Fed. Rep., 9, 19.)

But what is there held as to such property, while remaining in the State, is in nowise inconsistent with the power of the State to grant and of purchasers or other grantees to acquire in such lands a private property, which is pecuniarily valuable and can not be taken without compensation.

The taking of private property for public use within navigable waters, under the power to regulate commerce, is an exercise of that of eminent domain. Private property can be no more taken without compensation under this power than under eminent domain for other purposes of the Government. There may have been, in particular cases, a doubt whether what was taken was private property or whether there was a "taking" within the meaning of the Fifth Amendment; but there never has been a doubt that where really private property is really taken for public use just compensation must be made. In *Monongahela Nav. Company* v. *United States* (148 U. S., 312) it is said, on page 336:

"But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by the Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than to establish post-offices and post-roads; but, if Congress wishes to take property upon which to build a post-office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor."

The court adds (p. 337):

"Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be

said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post-office is equally true when condemnation is sought for the purpose of improving a natural highway. * * *

"It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction. It is not a case in which the Government requires the removal of an obstruction."

The last remark is equally true in this case. These oyster beds are in nowise an impediment to navigation, but leave the bed and channel in its normal state. They are there rightfully, planted by the authority of the State, which had the unquestioned right to grant such authority. They can not be considered a nuisance, which may be abated without compensation. It is not because they interfere with navigation, but because the Government desires to add to the facilities for navigation that they are to be taken. It is no less clear that their destruction by the making of this contemplated improvement will be a "taking" within the meaning of the Fifth Amendment. An actual manual caption is not necessary; but if it were, as I understand the facts, this channel can not be constructed without an actual taking and removal of these oysters and beds. Their removal will be as much a physical taking as would be the removal of a wharf, dock, or warehouse, where the land it occupies is needed for public use.

It has never been held that, in order to take property, the Government must make use of the property taken. If it needs the *place* occupied by this property and destroys it to occupy that place, it "takes" it, although it neither needs nor uses the property itself.

It is immaterial to the owner whether his property is used by the Government or only destroyed, and one form of taking is as much forbidden as the other, provided that, as in this case, such property can not be destroyed by the Government without what is, in fact, a physical taking.

In *Gibson* v. *United States* (166 U. S., 269), and certain other cases, the Supreme Court has indeed decided that compensation need not be made, unless there is an actual invasion of the plaintiff's property, although there may

have been a consequential injury resulting from the lawful exercise of a paramount right. In the case last cited, the court says, on page 275:

"But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision."

But on page 276, in distinguishing the case before it from cases where the overflowing of land was held to entitle the owner to compensation, the court says further:

"In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession."

This is no less true in the present case, and I am aware of no decision holding that, where there has been such physical invasion and consequent destruction of private property, compensation need not be made.

In *Pumpelly* v. *Green Bay Co.* (13 Wall., 166), on page 177, it is said:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizens, as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Upon the whole case, I advise you that if, as I understand to be the facts, these oyster beds are held by private individuals or companies under leases of such beds from the State of New Jersey, the interests of such owners therein constitute private property, which can not be taken or destroyed for public purposes without making just compensation.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

FORM OF BEQUESTS FOR THE LIBRARY OF CONGRESS.

"The Library of Congress" is not a proper legatee to be named in a bequest.

The question as to what is the best form of such a bequest depends upon the law of the testator's domicile, and it is therefore impossible to formulate any particular style of bequest that will be everywhere valid and in proper form.

However, a bequest "to the United States of America, to be deposited in the Library of Congress," which latter part may be varied in case of pecuniary bequests to "to be applied to the increase or improvement of the Library of Congress," will, it is believed, be a satisfactory form to be used generally in the States of the Union and in other English-speaking countries.

DEPARTMENT OF JUSTICE,

November 4, 1907.

SIR: I have the honor to acknowledge receipt of your request for an opinion upon the question stated in the following letter addressed to you by the Librarian of Congress:

"The authorities of the Library have from time to time received inquiry as to the proper form of bequest to the Library of Congress. It had been assumed that a bequest direct to the institution, under that title, would be valid. Recently grave doubt has been expressed as to this, the suggestion (inter alia) being made that the bequest should read 'To the United States of America, to be deposited in the Library of Congress.'

"The matter being one that may assume considerable importance we should value an opinion from the Attorney-

General that would serve as our guide in answering such questions."

The name "The Library of Congress" is used in the laws principally to signify (Rev. Stat., § 80) something "composed of books, maps, etc.," and partly the place in which these are kept (Rev. Stat., §§ 94, 97, 98).

There is no indication in the statutes concerning it that it is a corporation or artificial person. It is largely under the control of a joint committee of Congress, which committee is to exchange or otherwise dispose of duplicate or injured books and documents (Rev. Stat., §§ 86, 87).

For these reasons I do not think the Library of Congress is a proper legatee to be named in a bequest. I express no opinion upon the question whether a bequest so made would be held by the court to be in legal effect a bequest to the owner of the Library, the United States, to be applied to the increase of the collection of books, etc.

What the Librarian desires to know is the best form of bequest to recommend to prospective testators.

This is a question the answer to which depends upon the law of each testator's domicile, for testamentary gifts of personal property are regulated and controlled by that law, and as the laws differ(*see Russell* v. *Allen*, 107 U. S., 172; *Jones* v. *Habersham*, 107 U. S., 179; *Ould* v. *Washington Hospital*, 95 U. S., 303), I can not say that a particular style of bequest would be everywhere valid and in proper form.

The United States are a quasi corporation, capable of contracting, suing, receiving, and holding all manner of property and taking by devise (*Dugan* v. *United States*, 3 Wheat, 181; Marshall, C. J., in *United States* v. *Maurice*, 2 Brock., 109); and in a noted instance a bequest was made to the United States in a form which stood the scrutiny of the highest tribunals of England and this country. I refer to the one which gave rise to the Smithsonian Institution, which was a bequest by the Englishman, James Smithson, "to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men."

The form of bequest suggested by the Librarian, "to the United States of America, to be deposited in the Library of Congress," which latter part may be varied in case of pecuniary gifts to "to be applied to the increase or improvement of the Library of Congress" does not differ essentially from that used by Smithson.

In my opinion this will be found a satisfactory form to be used generally in the States of the Union and other English-speaking countries.

Very respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

FOOD AND DRUGS ACT—GUARANTY OF PROTECTION.

A wholesale dealer in Maryland, who purchased certain food, found afterwards to be adulterated, from a Pennsylvania manufacturer, receiving the latter's written guaranty as to the purity of the goods, in conformity with section 9 of the food and drugs act of June 30, 1906 (34 Stat., 768, 771), and who in turn sold the goods to a retail dealer in the District of Columbia under a similar guaranty, is completely protected by the guaranty of the Pennsylvania manufacturer from prosecution under that act.

The term "dealer" as used in section 9 of the above-named act, includes wholesale as well as retail dealers, and both are accordingly protected from prosecution by establishing a guaranty in conformity with the requirements of the act.

Section 9 created, in addition to the offense of manufacturing and dealing in adulterated and misbranded foods and drugs, the distinct and substantive offense of guaranteeing such articles, which offense, however, is not complete until the purchaser deals with the article in a manner otherwise punishable by the act.

The maker of a false guaranty is protected from prosecution by establishing a former guaranty from the person from whom he purchased.

A former guaranty affords a dealer complete protection against punishment for his own false guaranty as well as for selling or shipping the articles in violation of the act.

The fact that such wholesale and retail dealers are protected from prosecution does not exempt the adulterated food from confiscation under section 10 of the act.

There is a presumption against a construction of a statute which would cause grave public injury or even inconvenience (187 U. S., 118, 124).

DEPARTMENT OF JUSTICE,
November 11, 1907.

SIR: I have the honor to acknowledge the receipt of your letter of September 10 in which you request my opinion upon a question which has arisen in your Department in the administration of the food and drugs act of June 30, 1906, in a class of cases of which the following is a type:

An examination having been made in the Bureau of Chemistry, in accordance with section 4 of the act, of a sample of food purchased from a retail dealer in the District of Columbia, and the food having been found to be adulterated, the dealer was cited for a hearing, and, having appeared, established as a defense, under which he claimed protection, a written guaranty, conforming to the requirements of section 9 of the act, from a Maryland wholesaler who had sold him the food and shipped it to him in the District of Columbia in the exact condition in which he sold it here.

The Maryland wholesaler, having been then cited, in turn appeared and established a similar guaranty, under which he also claimed protection, from a Pennsylvania manufacturer who had sold him the food and had shipped it to him in Maryland in the exact condition in which he had in turn guaranteed it and shipped it to the retailer in the District of Columbia.

The question upon which my opinion is requested is whether, upon such state of facts, the Maryland wholesaler is amenable to prosecution for violation of the act or is protected by the guaranty from the Pennsylvania manufacturer.

By section 2 of the food and drugs act (34 Stat., 768) it is made a misdemeanor, inter alia, to ship any adulterated or misbranded food or drugs in interstate commerce, or to receive the same in such commerce, and, having so received, to deliver the same to any other person in original, unbroken packages, or to sell the same in the District of Columbia.

Section 9 of the act further provides:

"That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty [illegible] wholesaler, jobber, manufacturer, or ot

in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this act."

After careful consideration of this act, together with the memoranda prepared by the members of the board of food and drugs inspection, which you have submitted with your letter, I am of the opinion that the guaranty from the Pennsylvania manufacturer affords complete protection to the Maryland wholesaler and that he is hence not amenable to prosecution under the act on account either of the interstate sale and shipment made by him to the retailer in the District of Columbia or of the guaranty given by him in connection therewith.

1. It is clear that the Maryland wholesaler is protected from prosecution for the interstate sale and shipment made by him by the explicit provision of section 9, that "no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of the Act."

The broad term "dealer" which is used in this section, not being restricted in its meaning by any other provision of the act, includes those who deal at wholesale as well as those who deal at retail. I am of the opinion, therefore, that under the plain language of this provision any dealer, whether a wholesaler or retailer, who would otherwise be amenable to prosecution for dealing in an adulterated or misbranded article in violation of the act, is protected from prosecution on such account by establishing a guaranty in conformity with the requirements of the act, signed by a resident of the United States from whom he purchased such article.

2. A more difficult question, however, arises in reference to the liability of the Maryland wholesaler to prosecution by reason of the guaranty which he gave the District of Columbia retailer in connection with the sale and shipment to him.

It is expressly provided by section 9 of the act that wherever a dealer who would otherwise be subject to prosecution established a guaranty from a resident of the United States who sold him the articles, the dealer is thereby protected, and such guarantor "shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act." Construing this section in its entirety, I am of the opinion that its purpose was to create, in addition to the offense of manufacturing and dealing in adulterated and misbranded food and drugs specifically made misdemeanors by sections 1 and 2 of the act, the distinct and substantive offense of guaranteeing, under the food and drugs act, any adulterated or misbranded article, thereby enabling the purchaser to deal with such articles in a manner otherwise forbidden without being amenable to the punishment to which he would otherwise be subject, the offense of giving such false guaranty, however, not to be complete until the purchaser deals with the article thus guaranteed in a manner otherwise punishable by the act, in which event the guarantor would become subject to the same punishment for giving the false guaranty as that to which the purchaser would otherwise be amenable by reason of his dealing with the article.

Without discussing the scope and effect of this provision, I am of the opinion that whatever this may be, the maker of a false guaranty is just as much protected from any prosecution to which he might be liable on this account by establishing a former guaranty from the person from whom he purchased the article as he is thereby protected from prosecution for dealing with the article in a manner otherwise forbidden by the act; in other words, that the former guaranty is a complete protection against any prosecution under this act.

It is true that section 9 does not specifically state that the first guaranty shall protect the second guarantor, but this

result follows from the broad provision that "no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the * * * party * * * from whom he purchases such articles." As a prosecution for the false guaranty would be a prosecution "under the provisions" of the act, and as the dealer's protection under his vendor's guaranty is not limited by the act to prosecutions for dealing in the articles, but includes all prosecutions under its provisions, a former guaranty would in my opinion afford a dealer protection against the punishment to which he might otherwise be amenable for his own false guaranty as well as for selling or shipping the articles in violation of the act.

In short, the intention of Congress appears to have been to relieve from liability any person who would otherwise be subject to any prosecution under the act if he establishes a guaranty from the person who sold him the goods, provided such person is a resident of the United States, and therefore himself within the reach of prosecution, and to make such original guarantor subject to prosecution in lieu of the subsequent offender, Congress evidently intending to refer back liability in such case, in general to the original guarantor, who, of course, in the case of goods of domestic production, would usually be the manufacturer, who would know their real character, and, in the case of goods imported from a foreign country, would be the importer, who would assume responsibility therefor, and to make the liability to punishment fall upon such original guarantor so far as possible.

It further appears from the report of the House Committee on Interstate and Foreign Commerce, which reported the food and drugs bill for passage in substantially the form in which it was afterwards enacted, and which, under the doctrine of *Holy Trinity Church* v. *United States* (143 U. S., 457, 464), and *Binns* v. *United States* (194 U. S., 486, 495), may be properly looked to for the purpose of throwing light upon the intent of Congress, that the provision in question was inserted in the bill by the committee and that its general purpose was to protect persons dealing in the articles subsequent to the manufacturer or importing

agent and direct the penalty to the original gurantor as far as possible. The committee in its report said:

"As the principal purpose of the bill is to prevent interstate and foreign commerce in adulterated or falsely branded articles of food, drink, and medicine, the committee has inserted in the bill a provision intended to protect all persons dealing in the articles subsequent to the manufacturer or importing agent.

"Section 8 of the bill provides that no dealer shall be convicted when he is able to prove a guaranty of conformity with the provisions of the act signed by the manufacturer or the party from whom he purchased. The section requires that the guarantor shall reside within the United States and that the guaranty shall contain his full name and address.

"In other sections of the bill there are provisions for collecting samples or specimens and the examination of such in order to determine whether they are adulterated or misbranded, and the bill provides that any party from whom a sample was obtained shall be given an opportunity to be heard before the Secretary of Agriculture shall certify to the United States district attorney the results of an examination of the article as the basis for prosecution; so that if samples of goods shall be taken from a retail or wholesale dealer who has received a guaranty of conformity with the provisions of the act from the person who sold to him, he will be relieved from prosecution, and any penalty which may attach under the act will be directed to the original guarantor.

"These carefully prepared provisions of the bill will prevent any dealer being put to the expense of a prosecution where he takes the precaution to protect himself by requiring a guaranty." (H. R., 2118, 59th Cong., 1st sess., p. 3).

And again:

"The prosecutions which will be commenced by the national authorities will be mainly directed against the manufacturers of food products; or, if it be impossible to find the manufacturer, against the jobbers and wholesale dealers." (H. R., 2118, *supra*, p. 9.)

Section 8 of the bill which was thus inserted by the committee reads as follows:

"That no dealer shall be convicted under the provisions of this act when he is able to prove a guaranty of conformity with the provisions of this act in form approved by the rules and regulations herein provided for, signed by the manufacturer or the party or parties from whom he purchased said articles: *Provided*, That said guarantor resides within the United States. Said guaranty shall contain the full name and address of the guarantor making the sale to the dealer, and said guarantor shall be amenable to the prosecutions, fines, and other penalties which would otherwise attach in due course to the dealer under the provisions of this act." (H. R. 2118, *supra*, p. 11.)

It will be seen that the provision thus inserted and commented upon by the committee is substantially the same, so far as the present question is concerned, as section 9 of the bill as afterwards enacted, and it is made clear by this report that it was the intent of the committee, at least, in inserting this provision to entirely relieve from prosecution any retail or wholesale dealer who had received a guaranty from the person from whom he purchased, and, as stated by the committee, to "prevent any dealer from being put to the expense of a prosecution when he takes the precaution to protect himself by requiring a guaranty."

Any other construction of this act would work great hardship upon an innocent intermediary who, relying upon the guaranty which he receives from the original manufacturer of an article, sells it in interstate trade and guarantees it in his turn. And if the original guaranty does not fully protect him in such case, it would become exceedingly hazardous to sell and guarantee such article, even though guaranteed by the manufacturer, without first making, on his own account, a detailed investigation, chemical or otherwise, to ascertain whether it is in fact adulterated or misbranded. Manifestly, however, such a requirement would in many cases seriously impede and obstruct interstate trade.

It is stated in Doctor Dunlap's memorandum that, from the conditions that the board of food and drugs inspec-

tion has found to exist throughout the whole business community, dealers engaged in interstate trade are insisting on a guaranty from the seller and purchasing only under such guaranty; that in order to do an interstate business to-day a dealer must give a guaranty with the goods he sells, whether he be the actual manufacturer or not; and that if the dealer can not rely upon the manufacturer's guaranty as a protection, it must have the effect of preventing interstate sales on the part of small concerns, and even of large concerns who probably would not care to incur the added expense and trouble, in many cases prohibitive, of having the goods carefully analyzed in order to be fully acquainted with their character.

There is, however, a presumption against a construction of a statute which "would cause grave public injury or even inconvenience" (*Bird* v. *United States*, 187 U. S., 118, 124). And it was said by Lord Coke, in language which was quoted by Abbot, C. J., in *Margate Pier Co.* v. *Hannam*, 3 B & Ald., 266, 270, and cited with approval in *Holy Trinity Church* v. *United States*, 143 U. S., 457, 459, that "acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endamaged."

The construction which I have given the act is furthermore supported by the view expressed in Greeley's food and drugs act, section 65, page 4, that—

"A wholesaler or jobber who purchases food or drug products from the producer or from any one else may safely guarantee the goods so purchased to his consumers, provided he has from the producer or other person from whom he purchased the goods, a guaranty covering them."

For these reasons, I am of the opinion that in the case stated the Maryland wholesaler is not amenable to prosecution under the act, but is completely protected by his guaranty from the Pennsylvania manufacturer.

3. I should add, however, that the fact that both the District of Columbia retailer and the Maryland wholesaler are protected from prosecution by the guaranties which they have established from their respective vendors, does not, in my opinion, exempt the adulterated food from confiscation under section 10 of the act, which provides, *inter*

alia, that any adulterated or misbranded food or drug which is being transported in interstate commerce for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or is sold or offered for sale in the District of Columbia, may be proceeded against in the district where found "and seized for confiscation by a process of libel for condemnation." The provision of section 9 that no dealer shall be prosecuted when he establishes a guaranty from his vendor merely affords protection, in my opinion, against the criminal prosecution, fines, and other penalties to which the dealer would otherwise be personally amenable, and does not in any way affect the liability of the merchandise to confiscation under the provisions of section 10.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF AGRICULTURE.

CONGRESSMEN AND SENATORS—ELIGIBILITY TO CIVIL OFFICE.

A member of either House of Congress is eligible to be appointed to any other office not forbidden to him by law, the duties of which are not incompatible with those of a member of Congress.

The question as to whether a Congressman can be appointed a member of the Board of Managers of the Soldiers' Home, and become local manager of one of the homes, is wholly a matter for the decision of Congress itself. (Section 4826, Rev. Stat.)

There is no constitutional objection to the election of a member of Congress as a member of the Board of Managers of the National Home for Disabled Volunteers, although such an election would seem to be contrary to sound public policy.

Under other circumstances than those which thus involve the entire control of the Congress over a position established and filled by itself, the holding of a visitorial and an administrative office by the same person would be regarded as legally incompatible.

DEPARTMENT OF JUSTICE,

November 15, 1907.

SIR: In accordance with the direction contained in Secretary Loeb's letter of the 25th ultimo, I have the honor to give you my opinion on the questions presented in the inclosures with Representative Hale's letter to you bearing

date of October 25, 1907. The questions presented to you by Representative Hale are as follows:

"Whether or not, under the law and under the construction of the law, a man who is a Member of Congress or a United States Senator is eligible to be appointed to any other Federal office at the same time? If so, to what kind of office can he be appointed? For instance, can a man be a member of Congress and be appointed at the same time as a member of the Board of Managers of the Soldiers' Home, and become local manager of one of the Homes?"

The first question may be answered in the affirmative. A member of either house of Congress may be appointed to any other office not forbidden to him by law, and the duties of which are not incompatible with those of a member of Congress. It would not be advisable to state any particular offices which a member of Congress might fill, and this does not seem to be necessary, as Representative Hale mentions a specific office, namely, that of a member of the Board of Managers of the Soldiers' Homes, who should be the local manager of one of the Homes.

The law providing the method of the selection of the Managers of the National Home for Disabled Volunteers, which title includes the several institutions in the various parts of the United States known as "National Soldiers' Homes," is contained in section 4826 of the Revised Statutes, and provides that they "shall be elected from time to time, as vacancies occur, by joint resolution of Congress." The selection of these officers being thus entirely vested in the Congress, the determination whether a member of Congress may be elected is wholly a matter for the decision of the Congress itself, unless there should appear to be some constitutional provision bearing upon the subject. As the members of the Board of Managers receive no compensation as such (28 Stat., 412), and as the positions were created by act of March 21, 1866, it does not appear that the matter comes within the second clause of the sixth section of article 1 of the Constitution, that—

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been

created, or the emoluments whereof shall have been increased during such time; * * *."

Nor are such managers "Federal officers" who are prohibited by the Constitution from being members of Congress (*U. S.* v. *Mouat*, 124 U. S., 307). Moreover, the intent of the Congress is shown by the fact that the act of March 21, 1866 (14 Stat., 10), creating this office, which contained the provision that the nine elective managers should "not be members of Congress," was amended by the act of March 12, 1867 (15 Stat., 1), striking out the restriction above quoted.

While, as has been said, the question is held to be one for Congressional determination, it may be pointed out that the institution in question is a creature of the Congress, so that a member of Congress elected a manager of the National Home for Disabled Volunteers would become, as a member of the governing body, an officer (in his capacity of manager, as aforesaid) by his own appointment, subject to removal by himself, whose powers are conferred and whose duties are prescribed by himself, and who himself supervises his own management. He, in one capacity, determines the amount which, in another capacity, he may expend, and he supervises his own expenditures; so that he would be in the incompatible position of both visitor and an officer whose acts are the subject of inquiry; but, however incompatible, it is clearly within the province of the Congress to make the appointment, to continue or to discontinue it, and I, therefore, answer that there is no constitutional obstacle to the election of a member of Congress as a member of the Board of Managers of the National Home for Disabled Volunteers, although such an election would seem to be contrary to the principles of sound public policy, and, under other circumstances than those which thus involve the entire control of the Congress over a position established and filled by itself, the holding of a visitorial and an administrative office by the same person would be regarded as legally incompatible.

Very respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

APPOINTMENT—RETIRED OFFICER OF REVENUE-CUTTER SERVICE—CIVIL OFFICE.

The President has authority to appoint, without compliance with the civil-service rules, a retired officer of the Revenue-Cutter Service whose pay amounts to $2,625 per annum, to superintend the construction of self-righting and self-balancing lifeboats and other life-saving apparatus, for such period as his services may be required, at a rate of compensation to be fixed by the Secretary of the Treasury.

The civil-service act authorizes the making of special exceptions from the provisions of the rules promulgated thereunder, provided the exceptions are set forth in connection with the rules and the regulations therefor stated in the annual reports of the Civil Service.

Such employment will not be an appointment to an office as contemplated by the act of July 31, 1894 (28 Stat., 205).

DEPARTMENT OF JUSTICE,
November 15, 1907.

SIR: I have the honor to acknowledge receipt of your letter of November 8, asking for an opinion as to your right to employ Capt. Charles H. McLellan under the circumstances hereinafter set forth.

It appears that Captain McLellan is a retired officer of the United States Revenue-Cutter Service, who was for some years prior to his retirement detailed to the Life-Saving Service. Since that time he has been employed for a number of temporary periods, with the consent of the Civil Service Commission, in superintending the construction of self-righting and self-bailing lifeboats and other life-saving apparatus, in all of which he is an expert.

It now appears that the best interests of the Service require his continuance in this position, and I understand that you wish to know whether you may authorize his appointment, without compliance with the civil-service rules, for such period as his services may be required, at a rate of compensation to be fixed by the Secretary of the Treasury.

In reply, I have the honor to inform you that it seems to me clear that you have the necessary authority to so employ him.

The civil-service act authorizes the making of special exceptions from certain fundamental provisions of the rules

promulgated thereunder, provided the exceptions are set forth in connection with the rules and the reasons therefor stated in the annual reports of the Civil Service Commission. The only remaining question, then, as to your power to authorize the appointment of Captain McLellan arises from a consideration of the act of July 31, 1894 (28 Stat., 205), which reads as follows:

"No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate."

As a retired officer of the Revenue-Cutter Service, Captain McLellan holds an "office." His employment in the Life-Saving Service is by appointment and not by election, and this appointment is not made by you with the advice and consent of the Senate. His retired pay amounts to $2,625 per annum. He can not, therefore, hold another office. It seems clear, however, that his selection by the Secretary of the Treasury for employment in the Life-Saving Service will not make him an officer of that Department.

In the case of the *United States* v. *Hartwell* (6 Wall., 385, 393), it is said:

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.

"The employment of the defendant (a clerk in the office of an assistant treasurer of the United States) was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary."

The rule here laid down has been often quoted with approval and uniformly followed. Applying it to the case under consideration, it is quite clear that the proposed ar-

rangement with Captain McLellan is a mere contract of employment which does not embrace the idea of tenure, duration, or of an emolument fixed by law. The contract with Captain McLellan may therefore be entered into legally. A similar question was submitted to my predecessor, Attorney-General McKenna, and my view of the law is fortified by his able and well-considered opinion. (21 Op., 507.)

Respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

HAWAII—STATUTORY CONSTRUCTION—MAUI COUNTY BONDS.

Article 65 of the Hawaiian Laws of 1907, authorizing an issue of bonds by the county of Maui, which act was vetoed by the governor of Hawaii, but was afterwards passed with the approval of over two-thirds of each house of the legislature, is valid, notwithstanding section 4 of that act provides that the "act shall take effect upon the date of its approval by the President of the United States."

That section means merely that the act becomes effective upon the President's approval of those provisions of the act which, according to the terms of the preceding sections, require his approval in order to become effective—that is, his approval of the issue of the bonds.

Bonds issued under this act will constitute a legal obligation against the county of Maui whenever the President shall have signified his approval of their issue.

DEPARTMENT OF JUSTICE,
December 17, 1907.

SIR: I am duly in receipt of your letter of the 10th instant, asking my opinion as to the validity of an act of the legislature of the Territory of Hawaii, entitled "An act to authorize an issue of bonds by the county of Maui in the sum of one hundred and ten thousand dollars, under the provisions of act sixty-five of the Session Laws of Nineteen hundred and seven," and which appears by the paper accompanying your letter to have been passed after reconsideration of the veto of the governor, with the approval of more than two-thirds of the members of each house of the legislature of the said Territory on the 1st day of

May, A. D. 1907. The documents so accompanying your said letter further show that the act in question was vetoed by the governor, and its validity is now disputed by reason of the provision of its fourth section, which reads as follows: "Section 4. This act shall take effect upon the date of its approval by the President of the United States." It appears that the language of this section is construed as rendering the entire law nugatory, because it is supposed to involve a delegation of legislative power by the legislature of the Territory to the President.

Sections 49 and 50 of the act of Congress approved April 30, 1900, and entitled "An act to provide a government for the Territory of Hawaii" (31 Stat., 141), provides for the approval of bills which have duly passed both houses of the Territorial legislature by the governor, or their passage by a two-thirds majority of the members of each house, if disapproved by the governor, and, in either case, uses the language "it" (that is to say, the bill in question) "shall become a law" when so approved or so passed after disapproval. The act in question was passed over the governor's veto, in accordance with the requirements of section 50 above mentioned, and it thereupon became at once a law. It is true that, by the language of section 4, it was to become "effective" only upon the approval of the President of the United States, but I think the intendment of this section was misapprehended by the governor of Hawaii when he vetoed the bill, and is misapprehended by those who now question its validity.

Section 55 of the above-mentioned act of Congress contains the following language:

"* * * nor shall any debt be authorized to be contracted by or on behalf of the Territory, or any political or municipal corporation or subdivision thereof, except to pay the interest upon the existing indebtedness, to suppress insurrection, or to provide for the common defense, except that in addition to any indebtedness created for such purposes the legislature may authorize loans by the Territory, or any such subdivision thereof, for the erection of penal, charitable, and educational institutions, and for public buildings, wharfs, roads, and harbor and other public improvements, but the total of such indebtedness incurred in

any one year by the Territory or any subdivision shall not exceed one per centum upon the assessed value of taxable property of the Territory or subdivision thereof, as the case may be, as shown by the last general assessment for taxation, and the total indebtedness for the Territory shall not at any time be extended beyond seven per centum of such assessed value, and the total indebtedness of any subdivision shall not at any time be extended beyond three per centum of such assessed value, but nothing in this provision shall prevent the refunding of any existing indebtedness at any time; nor shall any such loan be made upon the credit of the public domain or any part thereof, nor shall any bond or other instrument of any such indebtedness be issued unless made redeemable in not more than five years and payable in not more than fifteen years from the date of the issue thereof; nor shall any such bond or indebtedness be incurred until approved by the President of the United States."

The title of the act under discussion is "An act to authorize an issue of bonds by the county of Maui," etc. Act 65 of the Session Laws of 1907 was itself entitled "An act to enable the counties to provide for county loans." The material provisions of act No. 139 are contained in sections 1, 2, and 3. Of these, section 1 authorizes the treasurer of the county of Maui, in accordance with the terms of a certain resolution of the board of supervisors of said county, "and subject also to the approval of the President of the United States," to issue bonds of said county to an amount bearing a rate of interest and for purposes specified in the section. Section 2 requires the issue and sale of the bonds, the application of their proceeds, and the payment of their principal and interest, to be made in strict conformity to the terms of act No. 65, above mentioned, "and every other term, provision, and condition which shall be prescribed with respect thereto by the President of the United States." Section 3 makes the bonds and interest coupons charges upon the consolidated revenues of Maui County, but prohibits the construction of the act as an authorization to said county to levy or impose taxes. The fourth and only remaining section is the one above set forth in full.

It is evident, from an examination of the language of the law as above set forth that the approval of the President was necessary, under the terms of section 55 of the act of Congress approved April 30, 1900, to make any one of its provisions "effective." By section 1 the bonds can not be issued without such approval. By section 2 they are to contain and be subject to any "term, provision, or condition" which the President may prescribe as a condition of such approval, and section 3 could, of course, have no legal efficacy until after the bonds were duly issued. In view of the tenor of all the rest of the act, it seems plain that the legislature of the Territory intended, by section 4, only to provide that there should be no delay in giving effect to the provisions of sections 1 and 2, when the President should have signified his approval of the issue of bonds thereby authorized. The section does not say that the act shall become a law when approved by the President, but that it shall then become "effective," or, in other words, that on the date mentioned effect shall at once be given to the provisions of the preceding sections. It is true that the grammatical construction of the section might, perhaps, justify a different interpretation or, at all events, leave its meaning in doubt, but the consideration of the entire act, and of the evident purpose of the Territorial legislature in its enactment, removes, in my opinion, any reasonable doubt which might otherwise exist as to the true construction of section 4. In *State* v. *Clark* (29 N. J. Law, 96) the court says:

"The language of the act if construed literally evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."

This authority, with many others, is cited in *Church of the Holy Trinity* v. *United States* (143 U. S., 457), and in the last-mentioned case the court says, p. 459:

"It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."

The legislature of Hawaii can not be supposed to have intended to require the approval of the President to this

act as a condition to its becoming a law. Such a construction, in the language of the court above quoted, "evidently leads to an absurd result." On the other hand, the approval of the President is made a condition of the legal validity of the bonds to be issued by section 55 of the organic act for Hawaii above quoted, and this is expressly recognized by sections 1 and 2 of the act above mentioned. It may be assumed, therefore, that the legislature, in speaking of the President's approval of the act, meant his approval of those provisions in the act which require his approval to become effective, or, in other words, the issue of the bonds. I advise you, therefore, that in my opinion the act in question is valid, and that the bonds will constitute a legal obligation on the county of Maui, according to the terms of the act, when the President shall have signified his approval to their issue.

Yours, very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE INTERIOR.

COAL IMPORTED FOR THE NAVY—DUTIES.

Coal imported for the use of the Navy is subject to the duties prescribed by paragraph 415 of the act of July 24, 1897 (30 Stat., 190), notwithstanding the coal is imported by the Navy Department and the duties will have to be paid from the appropriations of that Department.

DEPARTMENT OF JUSTICE,
January 2, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of October 21, in which you inclosed a letter from the Secretary of the Navy in regard to the duties on certain coal to be imported in the Puget Sound district for the use of that Department, and request an expression of my opinion upon the question whether this coal, which you assume to be bituminous, is entitled to entry free of duties.

The material provisions of the tariff act of July 24, 1897 (30 Stat., 151), are as follows:

It is provided by section 1 that, "unless otherwise specially provided for in this act, there shall be levied, collected,

and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed." By paragraph 415 certain rates of duty are prescribed upon bituminous coal.

This act contains no general exemption of articles imported by or for the use of the United States or a Department thereof, but there is specifically placed upon the free list by paragraph 500, "Books, engravings, photographs, etchings, bound or unbound, maps and charts imported by authority or for the use of the United States or for the use of the Library of Congress," and, by paragraph 640, "Plants, trees, shrubs, roots, seed cane, and seeds, imported by the Department of Agriculture or the United States Botanic Garden." (30 Stat., 196, 200.)

After careful consideration, I am of the opinion that the coal in question will be subject to the duties prescribed by paragraph 415 of the tariff act, although imported for the use of the Navy Department, and although, as I infer from your letter may be the case, it is to be imported by that Department and the duties paid by it from its appropriations.

In the opinion which I rendered on October 3, 1907, to the Secretary of the Navy in reference to the statute prohibiting the transportation of merchandise between different ports of the United States in foreign vessels, it was said that it "is a well-settled principle of statutory construction that a prohibition of this character does not extend to, or affect, the sovereign, unless its language requires that such a meaning shall be given it." (26 Opin., 415, 417.) As is said in *United States* v. *Hoar* (2 Mason, 311, Fed. Cas., 15373), by Story, circuit justice:

"Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the Government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute." We have, therefore, to determine in this case whether "the nature of the mischiefs to be redressed, or the language used," shows that the Government itself was in the contemplation

of the legislature when it required the importers of articles from foreign countries to pay the duties fixed by the act.

"The mischiefs to be redressed" or, in other words, the purposes of the legislature in this case, are indicated with sufficient accuracy by the title of the act itself. It is entitled "An act to provide revenue for the Government and to encourage the industries of the United States." The first of the purposes thus expressed certainly would not be promoted by requiring the payment of duties by the Government on articles imported from foreign countries for its own use. So far as the Government is concerned, such payments would amount, in effect, merely to taking money out of one pocket and putting it into another; obviously, this process would not "provide revenue for the Government." It is true that the law might be supposed to furnish a motive for the Executive Departments in the expenditure of general appropriations to purchase American rather than foreign goods, but, since we must assume that all responsible officers of the Government will be guided in their public acts by the policies adopted by the Congress, we must also assume, in the construction of the statute, that this motive would exist in full force without the need of any such enactment. If, therefore, the avowed, and universally understood, purposes of the act were all that we had to consider in this connection, I should find in them no sufficient reason to outweigh the presumption that the Government was not included in the general language requiring payment of duties by importers.

There are, however, two considerations which seem to point decisively to a different conclusion. In the first place, the language of the statute would seem, on its face, clearly to include the Government. Section 1 imposes duties on all imports "unless otherwise epecially provided for." Paragraphs 500 and 640 specifically provide that certain articles imported by the Government for its own use shall be on the free list. These special exceptions would have been altogether unnecessary if all importations by the Government were to be free of duty, and the natural and nearly conclusive implication from their insertion is that other governmental importations should be subject to the

same duty as is imposed on merchandise imported by private persons. The maxim *expressio unius est exclusio alterius* applies here with full force, as in the case of *Arredondo* v. *United States* (6 Peters, 691, 725). This construction is strengthened by the fact that in the preceding tariff act of 1894 (28 Stat., 509) "all articles imported by the United States" (paragraph 385) were placed upon the free list. The omission of the like provision in the tariff act of 1897, coupled with the special exemption of certain Government imports by the later statute, would seem to be well-nigh conclusive of the intent of the Congress to require articles imported by the Government, except in the instances specifically mentioned, to pay the same duties which were exacted upon private importations.

It is fair to say that the conclusions to be drawn from the language of the act are somewhat weakened by the facts that in the act of 1894 and in several earlier tariff acts, as, for example, those approved March 3, 1857 (11 Stat., 193), March 2, 1861 (12 Stat., 178), July 14, 1870 (16 Stat., 256), and March 3, 1883 (22 Stat., 488), there has been a general exemption from duty of all articles imported by the United States, and special exemptions of particular classes of articles likewise, but a comparison of these laws with the acts of July 30, 1846 (9 Stat., 42), June 6, 1872 (17 Stat., 230), and October 1, 1890 (26 Stat., 567), in which the general exemption is omitted, suggests strongly that the special exemptions may have been in each instance copied from the earlier laws without its being noted that the general exemption rendered them unnecessary.

It should be further mentioned that there is a decision in 2 Blatchford, *United States* v. *Lutz*, Fed. Cas. 15644, to the effect that light-house equipment imported by the Government, while the tariff act of 1846 was in force, was exempt from duty, although this act contained no general exemption of Government imports and no special exemption including in terms such articles. This decision, however, is not satisfactorily reported, and I do not think it can be accepted as determining the construction of the present tariff act. I have noted the references in the letter

from the Secretary of the Navy to sections 919 and 3464 of the Revised Statutes. The latter does not seem to me to have any application to the question now considered. Section 919 provides that suits for the recovery of duties shall be brought in the name of the United States, and it is suggested that this shows conclusively that the institution of such suits could not have been contemplated when the United States itself was the importer. I think this conclusion is justified, but it does not follow that all Government importations should be free of duty. It is to be presumed that the officials of the Government will observe the law, and, if the law requires them to pay duties, that they will pay them without any suit being brought. Moreover, as the suits would be brought, in theory of law at least, by direction of the President, and as he would have the power to cause at any time the duties to be paid by a similar order, it is obvious that a suit by the Government against itself, or by one branch of the Government against another, would be, in any case, no less unnecessary than absurd.

Secondly, I am informed by your letter "that it has been the uniform practice to charge duty upon dutiable merchandise imported for the use of the United States, except where express exceptions have been made, as in paragraphs 500 and 640 of the tariff act of 1897, and where exceptions have been allowed in provisions including bureaus of executive departments, as, for example, paragraph 638, which provides for the free entry of certain articles for scientific and other purposes," and that "a similar practice prevailed under the tariff act of 1890, which, like that of 1897, contains no provision except merchandise generally imported for the use of the United States." In my recent opinion to the Postmaster-General, dated September 27, 1907, on weighing the mails, I considered the scope and limitations of the rule stated as follows by the Supreme Court in the case of *New York, New Haven and Hartford R. R. Co.* v. *Interstate Commerce Commission* (200 U. S., 361, 401): "A construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has

been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, *when not plainly erroneous*, must be treated as read into the statute." (26 Op., 408.) In this case the Congress has expressly exempted *all* Government importations from payment of duties in some tariff acts and said nothing as to such exemption in others, including the act now in force, with full knowledge that, in the absence of such express exemption, your Department has always collected duty from the Government as from private individuals. I can not but construe its action as a legislative sanction of the interpretation thus placed by Executive practice upon statutes of this character, and as coming clearly within the language of the Supreme Court in the case of *United States v. Falk & Bro.* (204 U. S., 143), in which case the court held the practical construction given by Executive usage to a proviso in the tariff act of 1890 ought to control the interpretation of a like provision in the tariff act of 1897 (26 Op., 408).

This conclusion is fortified by the fact that in the very recent act making appropriations for fortifications and other works of defense, approved March 2, 1907 (34 Stat., 1062), the Congress provided "that all material purchased under the foregoing provisions of this act shall be of American manufacture, except in cases when, in the judgment of the Secretary of the War, it is to the manifest interest of the United States to make purchases in limited quantities abroad, *which material shall be admitted free of duty.*" This provision, in my judgment, clearly recognizes that, without the special exemption, importations by the Government would be subject to duties under the tariff act now in force.

I am constrained, therefore, to advise you that in my opinion coal imported by the United States for the use of the Navy is subject to the same duties which the like coal would pay were it imported by private persons.

Yours, very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

COMMISSIONER OF INTERNAL REVENUE—REFUND OF STAMP TAXES PAID WITHOUT PROTEST.

The Commissioner of Internal Revenue has no power, under section 3220, Revised Statutes, to refund taxes voluntarily paid without protest, under a mutual mistake of law.

The rule is firmly established and unqualified that protest is indispensable to the right to recover taxes claimed to have been illegally exacted.

Opinion of May 7, 1906 (25 Op., 605) followed.

DEPARTMENT OF JUSTICE,
January 9, 1908.

SIR: By your reference of December 18, 1907, it appears that certain claims for the refund of stamp taxes paid under Schedule A of the war revenue act of 1898 (30 Stat., 458) are pending in the Bureau of Internal Revenue. These claims, having been filed under section 3220, Revised Statutes, within the two years allowed by section 3228, were, however, rejected on the ground that the taxes were paid without protest, in accordance with 25 Op., 605, in which it was held that the Commissioner of Internal Revenue has no power under section 3220 to refund taxes voluntarily paid without protest under a mutual mistake of law. The claims have now been reopened for further consideration on the ground that under my opinion of March 11, 1907 (*ante*, p. 194), the matter of protest may be immaterial so far as the allowance of claims by the Commissioner of Internal Revenue is concerned; and your query, in effect, is whether the present case is ruled by 25 Op., 605, or the opinion of March 11, 1907.

In the latter opinion I held that under the special provisions of section 3 of the act of Congress of June 27, 1902 (32 Stat., 406), granting a refund of inheritance legacy taxes upon certain contingent beneficial interests, Congress had given a right of repayment regardless of any conditions that may have theretofore operated as a bar; that proceedings for the recovery of such moneys are not actions for recovery of taxes, but for money held in trust by the Government for those to whom it rightfully belongs; and that the question whether the taxes were originally paid under protest is eliminated and the question of voluntary

or involuntary payment is immaterial. That ruling rested altogether upon the act of Congress in question, and the opinion of May 7, 1906 (25 Op., 605), was reversed only so far.

The present case appears to be the usual and general one of a voluntary payment of taxes under a mutual mistake of law; there is no suggestion of a misapprehension of fact.

The rule is firmly established and unqualified that protest is indispensable to the right to recover taxes claimed to have been illegally exacted. It is stated as follows in the recent case of *Chesebrough* v. *United States* (192 U. S., 253, 259):

"The rule is firmly established that taxes voluntarily paid can not be recovered back, and payments with knowledge and without compulsion are voluntary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although generally speaking, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion, etc."

The scope and strength of the rule appear very clearly in this quotation, and it has been applied by the Supreme Court both where the court declined to pass upon the validity of the tax, as in the *Chesebrough* case just cited, and where the tax had already been held unconstitutional (*United States* v. *New York and Cuba Mail Steamship Co.*, 200 U. S., 488).

It is suggested, however, that a distinction exists between claims for refund under section 3220 before the Commissioner of Internal Revenue and suits brought in court for that purpose, and certain remarks of the court in the *Chesebrough* case are relied on as to the authority given by section 3220 to do what justice and right are found to require in order to correct mistakes, return overcharges, etc., respecting which "the conditions which govern contested litigation may well be regarded as waived." But by this lan-

guage the court seems to be referring to mistakes of fact alone, and this view is borne out by the concluding passage of that opinion, as follows:

"It is argued that the provisions of section 3220 for the repayment of judgments against the collector render protest or notice unnecessary for his protection, but it was clearly demanded for the protection of the Government in conducting the extensive business of dealing in stamps, which were sold and delivered in quantities, and without it there would not be the slightest vestige of involuntary payment in transactions like that under consideration. And we find no right of recovery, expressly or by necessary implication, conferred by statute in such circumstances."

If it should be held that in all cases arising under section 3220 claims might be allowed by the Commissioner whether or not there had been any protest, the result would seem to follow that where a tax is held by the courts to be unconstitutional but the particular claim is barred for lack of protest, other claimants who likewise had failed to protest could nevertheless apply to the Commissioner for refund of the same taxes and have their claims allowed. I can not think there should be one rule in this respect for claimants in court and another for claims before the Commissioner of Internal Revenue.

I therefore advise you that the present case is controlled by 25 Op., 605, which is not reversed or modified further than is indicated in my opinion of March 11, 1907 (26 Op., 194); and, consequently, that the refund of taxes under consideration can not be allowed.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

PURE-FOOD LAW—MARKING AND BRANDING OF PACKAGES OF DISTILLED SPIRITS.

The obvious purpose of the pure-food law of June 30, 1906 (34 Stat., 768), is altogether different from that of the provisions of law relating to internal revenue.

Sections 2 and 10 of the pure-food law require that a different brand or mark shall be placed upon an article transported in interstate or foreign commerce from that required by section 3449, Revised Statutes.

The names intended by the pure-food law to be used on brands or labels are names readily understood and conveying to the general public definite and familiar ideas as to the character or quality of the article branded, even though such names may be inaccurate in the view of a chemist, or physicist, or an expert in some particular industrial art.

Section 3287, Revised Statutes, requires gaugers to mark on the casks or packages "the particular name of such distilled spirits as known to the trade—that is to say, high wines, alcohol, or spirits, as the case may be," and it is immaterial whether this legislative declaration was, or was not, in accordance with the fact as to trade usages at the time of its adoption, or is, or is not, in conformity with such usages at present.

Congress considered the several kinds of spirits in the restricted sense in which the word is used in section 3287, Revised Statutes, as liquids which were neither "high wines" nor yet "alcohol."

The words "as the case may be" in section 3287, Revised Statutes, are intended to apply to "spirits" only and not to "high wines," on the one hand, or "alcohol" on the other.

The words "spirits, as the case may be," are used in conformity with the definition of the word "spirits" as given by Webster, viz: "Rum, whiskey, brandy, gin, and other distilled liquors having much alcohol, in distinction from wines and malt liquors." These words mean such distilled liquor included within the definition of spirits "as may be appropriate in the particular case," that is to say, "rum" or "whiskey," "brandy" or "gin," or whatever other name of a distilled spirit may be suitable.

The brand or label, however, must contain only the general name of a spirit. No descriptive or particular designation being required, contemplated or allowed by section 3287, Revised Statutes.

If the liquid contained in a cask or package is really so-called "neutral spirit," or in other words, for practical purposes, "ethyl alcohol," this statute requires it to be branded "alcohol" and does not permit it to be labeled a particular kind of potable spirits, as, for example, "whiskey."

There is no inconsistency between the provisions of section 3287 Revised Statutes, and section 8 of the pure-food law. The former statutes are not superseded by the latter.

There is nothing in the pure-food law which renders the provision of section 3289, Revised Statutes, forfeiting to the United States all distilled spirits not contained in receptacles and marked as herein prescribed, inappropriate; and that section was not repealed, either expressly or by implication, by the enactment of the pure-food law.

Section 3449, Revised Statutes, in so far as it relates to the shipment, transportation, or removal not wholly within the limits of a state, of spiritous or fermented liquors or wines, was repealed by the enactment of the pure-food law.

The question whether section 3449, Revised Statutes, in so far as it relates to purely intrastate shipment, transportation, or removal of spiritous or fermented liquors or wines, was repealed by the enactment of the pure-food law, not decided.

Those portions of the regulations of the Commissioner of Internal Revenue which require the gauger to mark or brand on the head of each cask containing distilled spirits "the particular name of the spirits as known to the trade," which brand or mark may be varied to suit whatever kind of spirits is contained in the package, as "high wines," "rye," "Bourbon," or "copper distilled" whiskey as the case may be, are inconsistent with the provisions of section 3287 Revised Statutes.

Section 3287, Revised Statutes, requires that casks or packages not containing either "high wines" or "alcohol" shall be marked with the name of a recognized distilled liquor included within the definition of potable "spirits," and nothing more.

The language of a later statute will be harmonized, if possible, with that of an earlier, and will be held to have modified the earlier only in so far as they are plainly in conflict; but if there is an evident conflict between the terms of the two enactments, those of the latter must prevail.

DEPARTMENT OF JUSTICE,
January 11, 1908.

SIR: I am duly in receipt of your letter of the 16th ultimo, in which you request my opinion "as to what directions should be issued and steps taken by this Department with regard to the marking and branding of casks and packages of distilled spirits, to the end that the regulations so issued may be in harmonious accord, if possible, with those of the Department of Agriculture, looking to the enforcement of the pure-food law." If this inquiry could be construed as a request that I offer suggestions as to the form of instructions to be given your subordinates, or of regulations to be adopted by your Department, for the purpose of securing an administration of the act generally known as the "pure-food law," in harmony with the action of the Department of Agriculture in relation to the same subject, it would seem obvious that such suggestion on my part would not constitute an answer to a "question of law,"

as the term is used in section 356, Revised Statutes. I understand your request, however, as asking, in substance, my opinion as to how far, if at all, sections 3287, 3289, and 3449 of the Revised Statutes, as amended by subsequent legislation, are amended or repealed by the pure-food law (34 Stat., 768), and whether the regulations of the Commissioner of Internal Revenue set forth in your above-mentioned letter are now authorized by the existing law. To this inquiry, I have the honor to reply as follows:

The above-mentioned sections of the Revised Statutes, as amended by subsequent legislation, read as follows:

DRAWING OFF, GAUGING, ETC., AND REMOVAL OF SPIRITS TO WAREHOUSE.

"SEC. 3287. All distilled spirits shall be drawn from the receiving cisterns into casks or packages, each of not less capacity than ten gallons wine measure, and shall thereupon be gauged, proved, and marked by an internal-revenue gauger, who shall cut on the cask or package containing such spirits, in a manner to be prescribed by the Commissioner of Internal Revenue, the quantity in wine gallons and in proof gallons of the contents of such casks or packages, and the particular name of such distilled spirits as known to the trade—that is to say, high wines, alcohol or spirits, as the case may be, shall be marked or branded on the head of such cask or package in letters of not less than 1 inch in length; and the spirits shall be immediately removed into the distillery warehouse, and the gauger shall, in the presence of the storekeeper of the warehouse, place upon the head of the cask or package an engraved stamp, which shall be signed by the collector of the district and the storekeeper and gauger; and shall have written thereon the number of proof gallons contained therein, the name of the distiller, the date of the receipt in the warehouse, and the serial number of each cask or package, in progressive order, as the same are received from the distillery. Such serial number for every distillery shall be in regular sequence of the serial number thereof, beginning with number one (No. 1) with the first cask or package deposited therein

after July twentieth, eighteen hundred and sixty-eight, and no two or more casks or packages warehoused at the same distillery shall be marked with the same number. The said stamp shall be as follows:

"Distillery warehouse stamp No. —. Issued by —— ——, collector, —— district, State of —— ——, distillery warehouse of —— ——, 18—, cask No. —; contents —— gallons proof spirits.

"_____ _____,
"*United States Storekeeper.*

"Attest: "_____ _____
"*United States Gauger.*"

"*Provided, however*, That upon the application of the distiller, and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, distilled spirits may be drawn into wooden packages, each containing two or more metallic cans, which cans shall have each a capacity of not less than five gallons, wine measure, such packages to be filled and used only for exportation from the United States. And there shall be charged for each of said packages or cases for the expense of providing and affixing stamps, five cents, instead of ten cents, as now required by law."

FORFEITURE OF UNSTAMPED PACKAGES.

"SEC. 3289. All distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States."

REMOVING ANY LIQUORS OR WINES UNDER OTHER THAN TRADE NAMES; PENALTY.

"SEC. 3449. Whenever any person ships, transports, or removes any spirituous or fermented liquors or wines, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or causes such act to be done, he shall forfeit said liquors or wines, and

casks or packages, and be subject to pay a fine of five hundred dollars."

I am informed by your letter that the regulations of the Commissioner of Internal Revenue contain the following provisions:

"The gauger will also mark or brand, with a die, stencil, or branding iron, on the head of the cask, in letters not less than one inch in length, the particular name of the spirits as known to the trade, which mark or brand will be varied to suit whatever kind is contained in the package, as 'high wines,' 'rye,' 'Bourbon,' or 'copper distilled' whisky, as the case may be.

"He will also cut or burn the date of inspection so that the head of the cask will appear as follows:"

[Drawing of head of cask here set out in illustration.]

"In addition to attaching the stamp for rectified spirits and cancelling the same, the gauger will cut upon the bung stave the result of the inspection in the manner directed herein under the head of 'Gauging and marking spirits in warehouse upon request of distiller,' and mark upon the head of each cask with a stencil plate, in durable ink, his name and office, the date of inspection, the particular name of such spirits as known to the trade, the proof, the name and place of business of the rectifier, and the serial number of the stamp for rectified spirits affixed thereto."

[Drawing of head of cask here set out in illustration.]

The act approved June 30, 1906 (34 Stat., 768), generally known as the "pure-food law," is entitled:

"An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes."

The portion of that law which seems to be relevant to the matters under discussion is the following:

"SEC. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained

therein which shall be false or misleading in any particular. * * *

"That for the purposes of this act an article shall also be deemed to be misbranded: * * *

"In the case of food:

"First. If it be an imitation of or offered for sale under the distinctive name of another article. * * *

"Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

"Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding."

In an opinion rendered by me to the President on April 10, 1907 (*ante*, p. 219), I said of the purpose of this law:

"The primary purpose of the pure-food law is to protect against fraud consumers of food or drugs; as an incident or secondary purpose, it seeks to prevent, or, at least, discourage, the use of deleterious substances for either purpose; but its first aim is to insure, so far as possible, that the purchaser of an article of food or of a drug shall obtain nothing different from what he wishes and intends to buy. According to the recognized canons of statutory construction, the language of its provisions must be interpreted with reference to and in harmony with this primary general purpose; so that, in determining the proper nomenclature for articles of food as defined in the act, the intention of the law will be best observed by giving to such articles names readily understood and conveying definite and familiar ideas to the general public, although such names may be inaccurate in the view of a chemist or physicist or an expert in some particular industrial art, as in the distillation and refining of spirits. Moreover, the same name may be given by dealers or by the general public to two or more substances, varying very materially in their scientific characteristics, and this fact must be given due weight in passing upon questions of branding or labeling under the law."

It is obvious that the purpose of this act, as thus defined, is an altogether different purpose from that of the provisions of law relating to internal revenue. The Congress can not be presumed to have had in mind, at the time of its enactment, the substitution of new provisions for any of those affecting the last mentioned subject-matter of legislation, and, under such circumstances, it is a well-established rule of statutory construction that the language of the later statute will be harmonized, if possible, with that of the earlier, and will be held to have modified the earlier only in so far as they are plainly in conflict. In the event, however, of an evident conflict between the terms of the two enactments, those of the later must, of course, prevail. Applying these rules of construction, I find nothing in section 3287 of the Revised Statutes which is necessarily repealed by section 8 of the pure-food law. Section 3287

regulates the removal of distilled spirits from the receiving cisterns of a distillery, prescribes the minimum size of the receptacles into which such distilled spirits may be drawn, and requires the gauger, in a manner to be prescribed by the Commissioner of Internal Revenue, to mark on the casks or packages, *inter alia*, "the particular name of such distilled spirits as known to the trade—that is to say, high wines, alcohol, or spirits, as the case may be." This statute constitutes a declaration by the Congress that when distilled spirits left the receiving cisterns they had one or the other of certain appropriate trade names, that is to say, "high wines," "alcohol," or "spirits, as the case may be," the last five words being, in my opinion, intended to apply to "spirits" *only* and *not* to "high wines" on the one hand or "alcohol" on the other hand. It is, of course, quite immaterial whether this legislative declaration was, or was not, in accordance with the fact as to trade usages at the time of its adoption, or is, or is not, in conformity with such usages at present. The Congress thereby prescribed certain names, and only those given or authorized by implication, as proper to be given to distilled spirits when such spirits should leave the receiving cistern; and, construing this statute, as we must, with relation to well-known facts in connection with the art of distillation, it seems plain that the Congress considered the several kinds of "spirits," in the restricted sense in which the word is used in this part of section 3287, liquids which were neither "high wines" nor yet "alcohol;" it being a notorious fact that the substances congeneric with alcohol found in what is practically the first product of distillation (that is to say, in "high wines") must be partially transformed or their properties otherwise eliminated to convert this product into some form of *potable* "spirits," and no less certain that if they be removed, for practical purposes, altogether, the process converts the said product into commercial "alcohol."

The thirteenth definition of "spirit (*pl.*)" given by Webster is: "Rum, whisky, brandy, gin, and other distilled liquors having much alcohol, in distinction from wines and malt liquors." In my opinion the words: "Spirits, as the

case may be," are used in conformity to this definition, and mean: "That distilled liquor included within the definition of 'spirits' which may be appropriate in the particular case," that is to say, "rum", or "whisky," "brandy," or "gin," or whatever other name of a distilled liquor may be suitable. The brand or label, however, must contain only a *general name* of a spirit; no description or particular designation is required, contemplated, or, in my opinion, allowed by the terms of section 3287.

The law evidently requires these brands or labels to be truthful; that is to say, if the liquid contained in the casks or packages is really so-called "neutral spirit," or, in other words, for practical purposes, "ethyl alcohol," this statute requires it to be branded or labeled "alcohol," and does not permit it to be labeled a particular kind of potable spirits, as, for example, "whisky;" but, supposing the brands and labels to be truthful, I can not see how such articles could be regarded as "misbranded" under the provisions of section 8 of the pure-food law, above quoted. I advise you, therefore, that, in my opinion, there is no inconsistency between the provisions of section 3287 of the Revised Statutes and section 8 of the pure-food law, and that the former statute is not superseded or repealed by the latter.

The same is true of section 3289. I find nothing in the pure-food law which renders the provision of that section inappropriate, and it was not, in my opinion, repealed, either expressly or by necessary implication, by the enactment of the said law.

With respect to section 3449, there is more difficulty. Sections 2 and 10 of the pure-food law (34 Stat., 768), so far as material for our present purpose, are as follows:

"SEC. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State

or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court."

"SEC. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation."

It is my opinion that these provisions, in connection with section 8, above quoted, prescribe for the shipment, transportation, or removal of any spirituous or fermented liquors or wines from one State or Territory to another or from or to or within the District of Columbia, or from or to any foreign country, or from or to the insular possessions of the United States, a different brand or mark on an article so transported from that required by section 3449. The proper name or brand known to the trade may yet be one containing a "statement," "design," or "device" which

may be false or misleading in some particular. As pointed out in the extract heretofore given from the opinion rendered by me to the President on April 10 last past, I think the names intended by the pure-food law to be used in brands or labels should be "names readily understood and conveying definite and familiar ideas to the general public, although such names may be inaccurate in the view of a chemist or physicist or an expert in some particular industrial art, as in the distillation and refining of spirits." It follows that the name "known to the trade as designating the kind and quality" of a wine or a spirituous or fermented liquor may not be one conveying to the general public accurate information as to such character or quality, and, in so far as the provisions of section 3449 relate to shipment, transportation, or removal not wholly within the limits of a State, it seems to me clear that it was repealed by the adoption of the pure-food law; this construction being strengthened by the fact that the latter prescribes an altogether different punishment for the offenses described in both.

It is yet more difficult to determine whether section 3449 is to be considered as repealed in so far as it relates to purely intrastate shipment, transportation, or removal. So far as I am informed, however, either by your letter and the accompanying documents or from any other source properly open to the consideration of this Department, this question has not yet arisen in a practical form, and, in view of its inherent difficulty, I think it more appropriate to defer the expression of any opinion regarding it until circumstances render such expression necessary.

The regulations quoted in your letter and hereinbefore set forth are in conformity with the provisions of section 3287, except in one particular. That section does, indeed, require the gauger to cut on the cask or package containing the distilled spirits drawn from the receiving cistern "the particular name of such distilled spirits, as known to the trade;" and if this passage stood alone, or if the words immediately succeeding could be construed as used by way of illustration only, the regulations in question might perhaps be justified by the terms of the law; but when the Congress adds to the language just quoted the words "that is to say,

high wines, alcohol, or spirits, as the case may be," I am obliged to conclude that the intention of the law was to have casks or packages not containing either "high wines" or "alcohol" marked with the name of a recognized distilled liquor included within the definition of potable "spirits" and *nothing more*. In view of the long-continued practice of your Department, as set forth in your letter and the accompanying documents, and the administrative construction thereby given to the statute of 1879, now constituting section 3287, I should be very reluctant to reach this conclusion were it not for the fact that these regulations seem to me clearly inconsistent with the terms of the pure-food law, and, if they were justified by section 3287, the section would have to be considered *pro tanto* amended by the law in question. In saying this I am not unmindful of the fact that the marking to be done under the provisions of section 3287 must be ordinarily a purely intra-State act. But not to mention the improbable contingency of a distillery being located so near the boundaries of two States that its warehouse might be on the other side, it is in nowise improbable that a distillery should be located in the District of Columbia; in which case, for the reason already given with respect to section 3449, these regulations would be in evident conflict with the provisions of the pure-food law.

It does not appear from your letter or any of the accompanying documents upon what information the gauger is expected to act in determining the particular name of the spirit "as known to the trade" when he marks the package or cask. If the construction which I have placed on section 3287 is correct, there would be very little, if any, danger of misbranding the article he has to mark, since there could hardly be, in any instance, room for serious doubt as to whether the substance was high wines, potable spirits, or alcohol, or, in the secondly-mentioned contingency, whether it was rum or brandy or some other well-known liquor; but the regulations you have called to my attention appear to impose upon the gauger the duty of determining questions respecting the character of the spirit which might be readily attended with considerable difficulty, and this con-

stitutes, to my mind, a further reason for confidence in the opinion I have expressed that these regulations can not be sustained under the section in question, independently of the operation of the pure-food law. It is needless to add that the law evidently would not sanction the marking of the casks or packages on merely hearsay information obtained from the distiller or his representative. Such a practice would amount to allowing a manufacturer to mark his own product and have the United States, without inquiry, guarantee the accuracy of his marking.

I advise you, therefore, that the portions of your regulations to which you have called my attention are, in my opinion, contrary to law in the respects above indicated, and need to be modified in accordance with the law as indicated in this opinion.

I remain, sir, yours, respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

NAVAL OFFICERS—ADVANCEMENT—RETIREMENT—RANK.

Passed assistant engineers of the Navy entitled to advancement to the grade of chief engineers, and assistant engineers entitled to advancement to the grade of passed assistant engineers, under the act of June 29, 1906 (34 Stat. 554), should be retired with a rank above that held by them respectively at the time of retirement, and with the pay of that rank.

DEPARTMENT OF JUSTICE,
January 13, 1908.

SIR: I have the honor to reply to your note of December 28, 1907, in which, with its inclosures, you ask my opinion upon the case there stated, in substance, as follows:

Certain passed assistant engineers of the Navy, with the rank of lieutenant, have been placed on the retired list of the Navy in the next higher grade—that is, that of chief engineer—but still with the same rank of lieutenant which they held, respectively, upon such retirement. And certain assistant engineers of the Navy, with the rank of lieutenant, junior grade, have been placed upon the retired

list of the Navy in the grade of passed assistant engineer, but still with the same rank of lieutenant, junior grade, which they held, respectively, at the time of retirement. That is, in each class these officers were respectively advanced to the next higher grade, but with no advancement in rank; while they claimed that they should be advanced, not in grade only, but also in rank. And your specific question is, "Whether passed assistant engineers, entitled to advancement to the grade of chief engineer, and assistant engineers entitled to advancement to the grade of passed assistant engineer, under the act of June 29, 1906, are entitled to other than the lowest rank of the grades to which they are respectively advanced."

The difficulty appears to have arisen from the fact that, while the act referred to requires that these officers be placed upon the retired list, "with the rank of one grade above that held at retirement," there are, as to each of these classes, more than one rank in the next higher grade, and the act does not define the one to which the officer shall be entitled. Thus, as shown by the papers transmitted with your note, in the grade chief engineer, the next above passed assistant engineer, there were four ranks, namely, captain, commander, lieutenant-commander, and lieutenant, and in the grade of passed assistant engineer there were the ranks of lieutenant and lieutenant, junior grade.

The promotion of these officers has been made upon the theory that the purpose of the act was an advancement in *grade merely*, and *not* in *rank*. Thus, in a report of the Bureau of Navigation, from which you quote, it is said:

"The meaning of this wording is that the officer shall be advanced one grade, and as a result of this advancement he is to receive the rank and pay of the grade to which he is advanced, and does not require that the officer shall be advanced one grade and advanced also in rank. The prime object of the legislation was an advancement in grade, the rank and pay merely being incidental of that grade."

And taking this as the meaning and purpose of the act, these officers have each been advanced one grade, but with no advance of rank.

The act of June 29, 1906 (34 Stat., 554), provides that an officer of the Navy, with a creditable record and who served in the civil war, etc., "shall, on retirement, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement."

As far as concerns this question of rank, the measure is identical with that of section 11 of the naval personnel act, which, with reference to the retirement of the same class of officers, provides that such officers shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade.

These provisions have been uniformly held to mean and intend an advancement or promotion of the officer to whom they refer, and this, I think, is undoubtedly their meaning and purpose.

Since the provision is one for the advancement of these officers, as it certainly is, it seems no less certain that it requires an advancement *in rank*. The language is plain as to this; any ambiguity comes later. That language is, "shall be placed on the retired list of the Navy *with the rank* and retired pay of one grade above that actually held by him at the time of retirement."

This language can have but one meaning. It is the *rank* and *not* the *grade* which is the subject of whatever advancement or change is here directed. This legislation contemplates an advancement of the officer to a rank *above* that already held by him, and this is its sole purpose. I think this legislation was intended to give to every officer within its purview something which he did not already have, and I feel no doubt, from the language used, that this something was higher rank. The language may not be happily chosen to express the idea, but, when read in the light of the manifest purpose of the provision, it is not obscure. These two acts had for their purpose to do something for officers who, in addition to the ordinary naval service which all officers render, have the additional merit of a creditable service in the civil war. For this reason they are to be given something which they would not otherwise have,

something not conferred upon officers who have not had this special service; and I think what was thus conferred, from the language used, could not be an advancement in grade *alone*—it must have been an advance in rank. The officer is to be given "the rank . . . of one grade above that actually held by him at the time of retirement." I do not think this is done when the officer is placed in the next higher grade with the lowest rank of that grade, although that rank is no higher or is even lower than that which the officer already held. If the language used justifies the placing the officer in the next grade, with a rank no higher than that already held, it would equally justify this, even if the new rank should be actually lower than the present one. I think this provision certainly intended an advancement in rank on account of special service, not an advancement in grade, for which no provision, so far as I can see, is made directly, and, in this view of its purpose, it is obvious that the act is not complied with by placing the officer in a higher grade but with no change in rank. It may be that the expression "with the rank of one grade above that actually held" is susceptible of the meaning that the officer shall be retired with *some one* of the ranks of one grade above, etc., and thus might be complied with literally by giving any rank of the higher grade, although it might be no higher or was even lower than that already held. But since I consider the provision as manifestly intending an advancement in rank, it must be construed to require that the officer be retired with a rank higher than that already held.

Upon careful consideration I have no doubt that under this act these officers should be retired with a rank higher than that held by them respectively at the time of retirement; and, having determined the rank in which the officer shall be retired, he is to have the pay of that rank.

The question of the particular rank in the higher grade with which these officers should be retired is not involved in the question submitted by you, and, although I am asked by their counsel to express an opinion upon that point, I think I should confine myself to an affirmative answer to

your precise question in case this lowest rank of the higher grade is not above that already held by the retired officer.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE NAVY.

RIGHT OF UNITED STATES TO DISPOSE OF WYANDOTTE CEMETERY, KANSAS CITY, KANS.

The fee-simple title to the lands formerly used as a burying ground by the Wyandotte Indians, now located in Kansas City, Kans., and withheld from sale and permanently reserved and appropriated by the treaty of January 31, 1855, as a public burying ground, has always been in the United States, subject to the right of the Indians to use it as a burying ground; and the Indians having abandoned that right, the United States has authority, under the treaties of January 31, 1855 (10 Stat., 1159), and February 23, 1867 (15 Stat., 513), to dispose of such lands for the benefit of the Indians and to convey a good title thereto.

The treaty of 1855 did not dedicate the land in question to "the general public," the evident intention of the Indians being to continue the use of such grounds solely for the burial of their own dead.

DEPARTMENT OF JUSTICE,
February 4, 1908.

SIR: I have received your letter, requesting my opinion whether, by proceeding under authority of the act of Congress of June 21, 1906 (34 Stat., 325, 348), a good title to the Wyandotte Cemetery located in Kansas City, Kans., can be conveyed.

That act provides:

"That the Secretary of the Interior is hereby authorized to sell and convey, under such rules and regulations as he may prescribe, the tract of land located in Kansas City, Kansas, reserved for a public burial ground under a treaty made and concluded with the Wyandotte tribe of Indians on the thirty-first day of January, eighteen hundred and fifty-five. And authority is hereby conferred upon the Secretary of the Interior to provide for the removal of the remains of persons interred in said burial ground and their

reinterment in the Wyandotte Cemetery at Quindaro, Kansas, and to purchase and put in place appropriate monuments over the remains reinterred in the Quindaro Cemetery. And after the payment of the costs of such removal, as above specified, and the costs incident to the sale of said land, and also after the payment to any of the Wyandotte people, or their legal heirs, of claims for losses sustained by reason of the purchase of the alleged rights of the Wyandotte tribe in a certain ferry named in said treaty, if, in the opinion of the Secretary of the Interior, such claims or any of them are just and equitable, without regard to the statutes of limitation, the residue of the money derived from said sale shall be paid *per capita* to the members of the Wyandotte tribe of Indians who were parties to said treaty, their heirs, or legal representatives."

You say:

"A committee appointed to carry said provision into effect has appraised the land at $70,000, and has been directed by the Commissioner of Indian Affairs to offer it to the city authorities, and, if refused by them, to endeavor to make a sale of the property as a whole to private parties.

"The Commissioner has been informed that the city counselor of Kansas City, Kansas, has expressed a doubt as to whether the United States can convey a good title to the cemetery grounds, for the reason that, under the treaty of January 31, 1855 (10 Stat., 1159), the Wyandotte tribe of Indians acquired the legal and equitable title to the land, as well as burial rights in the tract, and that the act of June 21, 1906, does not and can not forfeit or set aside the title of those persons to the property."

The conflicting theory is suggested in your letter to me that by a treaty of 1855 this land was irrevocably dedicated to the general public as a burying ground. The treaty of January 31, 1855 (10 Stat., 1159), to which you refer provides (section 2), that:

"The Wyandotte Nation hereby cede and relinquish to the United States, all their right, title, and interest in and to the tract of country situate in the fork of the Missouri and Kansas rivers, which was purchased by them of the Delaware Indians, by an agreement dated the fourteenth

day of December, one thousand eight hundred and forty-three, and sanctioned by a joint resolution of Congress approved July twenty-fifth, one thousand eight hundred and forty-eight, the object of which decision is, that the said lands shall be subdivided, assigned, and reconveyed, by patent, in fee simple, in the manner hereinafter provided for, to the individuals and members of the Wyandotte Nation, in severalty; except as follows, viz: The portion now enclosed and used as a public burying ground, shall be permanently reserved and appropriated for that purpose."

You do not mention, however, a subsequent treaty, of February 23, 1867 (15 Stat., 513), with the Wyandottes, providing *inter alia*, that:

"Whereas a portion of the Wyandottes, parties to the treaty of one thousand eight hundred and fifty-five, although taking lands in severalty, have sold said lands and are still poor, and have not been compelled to become citizens, but have remained without clearly recognized organization, while others who did become citizens are unfitted for the responsibilities of citizenship; and whereas the Wyandottes, treated with in eighteen hundred and fifty-five, have just claims against the Government, which will enable the portion of their people herein referred to to begin anew a tribal existence: Therefore, it is agreed: * * *

"ART. 13. The United States will set apart for the Wyandottes, for their future home, the land ceded by the Senecas in the first article, to be owned by the said Wyandottes in common * * *. A register of the whole people, resident in Kansas and elsewhere, shall be taken by the agent of the Delawares, under the direction of the Secretary of the Interior, on or before the first of July, one thousand eight hundred and sixty-seven, which shall show the names of all who declare their desire to be and remain Indians, and in a tribal condition, together with incompetents and orphans, as described in the treaty of one thousand eight hundred and fifty-five; *and all such persons, and those only, shall hereafter constitute the tribe: Provided*, That no one who has heretofore consented to become a citizen, nor the wife or children of any such person, shall be allowed to become

members of the tribe, except by the free consent of the tribe after its new organization, and unless the agent shall certify that such party is, through poverty or incapacity, unfit to continue in the exercise of the responsibilities of citizenship of the United States, and likely to become a public charge."

From an examination of a letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated January 17, 1905, the report of the Commissioner for 1869 (pages 33 and 463), and the treaty of 1867, I find that practically the whole of the tribe of 1855 failed to become such resident allottees and citizens as the treaty of 1855 contemplated. They had been and continued to be tribal Indians, and Congress, apparently accepting the actual facts as stronger than the project of the treaty, again recognized them as such Indians. The rights of third parties to their quickly-sold allotments do not seem to have been questioned; but in accordance with the fact, the Government, in and after 1867, recognized and treated with these people as a tribe of Indians, notwithstanding the treaty of 1855, and notwithstanding the tribal powers of government had been for several years latent in the individual members, necessitating a reorganization.

Now, I do not accede to the proposition that the treaty of 1855 dedicated this land to "the general public." By it the title to all of the land of the tribe passed to the United States, to be subdivided and reconveyed to the Indians in severalty, "except as follows, viz, the *portion now inclosed and used as public burying ground* shall be permanently reserved for that purpose."

I see no indication in this provision of an intention to dedicate the land to "the general public," if, by that phrase, any and everyone, white, black, and Indian be intended. This land had been sold to the Wyandottes by the Delawares, another Indian tribe, who desired them as neighbors (9 Stat., 337), and it was in 1855 an Indian burying ground. No reason is apparent why the Wyandottes, who were expected to reside upon allotments around it, should have expected or intended persons not belonging to their tribe to be buried in this cemetery. Probably the unlikelihood that

any strangers would be interred there constituted the only reason why it was not deemed necessary to say explicitly in the treaty that only the Wyandottes should use the cemetery or to qualify the phrase "public burying ground" by restricting it to their own use. "A cemetery may be either a public or a private one. The former is used by the general community, or neighborhood, or church, while the latter is used only by the family or a small portion of the community." (*Lay* v. *United States*, 12 Ind., App., 362.)

In my opinion, the Wyandottes in this treaty intended that this "portion" of *their* land "*now* inclosed and used as a public burying ground" should be "reserved" for "that purpose," that is, for their own burying purposes only. The evident intention was to continue the former use, not to authorize an entirely different one.

If so, the Indians, having long since reorganized and removed to Indian Territory (now Oklahoma), with a few insignificant exceptions, and their title, which, as you point out, was a right of occupancy, having been transferred to the United States by the treaty of 1855, with the stipulation that these lands, then used as a burying ground, should be permanently "reserved" and appropriated for that purpose, it would seem that the fee title to this land has always been in the United States, subject, after 1855, to the right of the Wyandottes to use it for the purpose indicated.

I think this right may now be regarded as abandoned, leaving the fee unincumbered and to be disposed of as to the Government may seem just and wise. If, however, the land belongs to the tribe, the Government can freely dispose of it for the benefit of the tribe. (*Cherokee Nation* v. *Hitchcock*, 187 U. S., 294.)

It would seem from recitals in the letter of the Commissioner of Indian Affairs, dated January 17, 1905, above mentioned, that "a majority of the members of the Wyandotte tribe in Indian Territory, present at a regularly called meeting of the tribe, held November 29, 1904, adopted a resolution authorizing the sale of said burying ground."

I venture to suggest that no harm could be done if you were to secure for the United States or any purchaser a

conveyance in the nature of a quitclaim deed from the Wyandottes in Oklahoma, who can probably be induced to give one with practical unanimity, and this measure might tend to remove any doubts as to the title, although I can find no sufficient reason for such doubts.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE INTERIOR.

NAVAL OFFICERS—RANK AND GRADE AT RETIREMENT.

The act of June 29, 1906 (34 Stat., 554), providing for the retirement of certain officers of the Navy, authorizes their retirement with the rank of the next higher grade, which is that next above the rank held by them, respectively, at the time of retirement.

DEPARTMENT OF JUSTICE,
February 8, 1908.

SIR: In an opinion rendered to your Department under date of January 13, 1908 (*ante*, p. 487), I held that certain engineers officers of the Navy on the retired list were entitled, under the provisions of the act of June 29, 1906, to be so placed with a rank above that actually held by them at retirement, but declined to express an opinion as to the particular rank to which such officers are entitled in case the next higher grade to which they are advanced has more than one rank, because this was not involved in the question submitted.

In your letter of January 27, 1908, to which, with its inclosures, I have the honor to respond, you ask my further opinion as to the particular rank in the next higher grade to which these officers are respectively entitled when there is more than one rank in that grade.

The particular case is this: In the engineer corps of the Navy there are the grades of chief engineer, passed assistant engineer, and assistant engineer. In the first of these there are four ranks—captain, commander, lieutenant-commander, and lieutenant—and in the second there are two ranks, viz, lieutenant, and lieutenant, junior grade. Certain passed assistant engineers, with the rank of lieutenant, were retired in the grade of chief engineer, the next higher

grade, but with no advance in rank, and certain assistant engineers, with the rank of lieutenant, junior grade, were retired in the grade of passed assistant engineers, the next higher grade, but also with no advance in rank.

This Department having held that those officers were each entitled, upon retirement, to a rank above that already held by them respectively, your present question is as to which of the ranks in the next higher grade those officers should be advanced, respectively, under the act of 1906 above referred to.

It is understood that all these officers here referred to were on the retired list before and at the passage of the navy personnel act, which transferred the engineer corps from the staff to the line of the Navy, and are brought within the act of 1906 by the provision making that act applicable also to officers who were already on the retired list. They must, therefore, be here treated as officers of the staff and not of the line.

The act of June 29, 1906 (34 Stat., 554), provides that certain officers of the Navy who served in the civil war, on retirement, may be "placed on the retired list with the rank and retired pay of one grade above that actually held by him at the time of retirement."

This does not say expressly to which particular rank in the next higher grade the officer is entitled where there is more than one rank in that grade. But I have no doubt that, unless affected by the statutory provision referred to later, this provision is governed by the practice and usage of the Navy, prescribed and sanctioned by law, which require that, in these grades of the service, except in cases otherwise especially provided, promotions be made from the lower to the next higher rank or grade.

And in this case it is conceded by counsel for these officers that, unless affected by other provisions, the statute in question would entitle these officers to be promoted only one rank, or step in rank, from that previously held. Thus, in their supplemental brief, they say:

"If only *one rank* was appropriate to the advanced grade the officer would unquestionably take that rank; if

four ranks were appropriate, as they are, and there was no law determining which of the four an officer was entitled to have, he would doubtless take the rank next above that previously held."

This is doubtless correct. It remains, therefore, to ascertain if any law, in determining to which particular rank the officer is entitled, has changed this usual order of promotion.

It is strenuously urged on behalf of these officers that sections 1485 and 1486, Revised Statutes, have this effect and give them a higher rank, so that, when credited with the length of service as there required, they are entitled to be placed on the retired list with a rank more than one step above that held at retirement; in other words, it is claimed that certain of these passed assistant engineers, with the rank of lieutenant, should have the grade of chief engineer, with the rank of captain, the highest rank in that grade. These sections are as follows:

"Section 1485. The officers of the staff of the Navy shall take precedence in their several corps, and in their several grades, and with officers of the line with whom they hold relative rank, according to length of service in the Navy.

"Section 1486. In estimating the length of service for such purpose, the several officers of the staff corps shall, respectively, take precedence in their several grades and with those officers of the line of the Navy with whom they hold relative rank who have been in the naval service six years longer than such officers of said staff corps have been in said service; and officers who have been advanced or lost numbers on the Navy Register shall be considered as having gained or lost length of service accordingly."

It seems to be certain that the portion above quoted of the act of June, 1906, makes the rank "actually held" by the officer at retirement the basis of whatever advancement is to be made. The rank actually held by these officers at that time was, in one class, that of lieutenant, and in the other that of lieutenant, junior grade, so that any advancement must be made from those ranks respectively.

Which is the actual rank of officers of the Navy, although relative in form, is defined by assimilating it with the rank

of certain officers of the Army; and a brief consideration of this will aid in the solution of the question presented.

Section 1466, Revised Statutes, fixing the relative rank of officers of the line and officers of the staff in the Navy, provides that a captain in the Navy shall rank with a colonel in the Army; a commander with lieutenant-colonel; lieutenant-commander with a major; lieutenant with a captain. As these staff officers are, equally with those of the line, "officers of the Navy," as stated in that section, the provision applies as well to them as to officers of the line, and thus defines the rank in both branches of the naval service. And since the navy personnel act has eliminated the word "relative" in this connection, this is their actual rank. This merely defines the rank of these officers, by making the rank of a captain the same as that of a colonel, the rank of a commander the same as that of a major, and so on.

In the line of the Army, grade and rank in that grade are the same. That is, a colonel is in the grade of colonel, and has also the rank of colonel; and there is but one rank in that grade, namely, that of colonel. But as there are several colonels in that grade, their relative rank as between themselves is fixed by dates of commission. That is, a colonel with the earlier date will rank and take precedence of one in the same grade but with a junior commission; but all will still have the same rank of colonel.

This is also the case in the line of the Navy. For example, one in the grade of captain has also the rank of captain, a commander has the rank of commander, and so on. But there are several captains and several commanders, and their relative rank as between officers in the same grade and rank is prescribed; yet there is only one rank of captain, one of commander, and so on. In the staff of the Navy this is different. As above stated, in the grade of chief engineer there are four ranks, captain, commander, lieutenant-commander, and lieutenant; and in the grade of passed assistant engineer there are two ranks, lieutenant, and lieutenant, junior grade.

Now as the actual rank of all officers of the Navy has been fixed, as shown above, by section 1466, Revised Stat-

utes, and as there are, in the staff corps, several officers of the same grade and rank, as captain, commander, etc., it was necessary that their relative rank, as between themselves and officers of the same rank in the line, be fixed and determined.

This is done by sections 1485 and 1486, and is determined, not by relative dates of commission, but by length of service in the Navy. As above set forth, these sections do not attempt or purport to fix the actual rank which staff officers hold in the Navy, or to change that rank as fixed by section 1466, but merely define the relative rank which these officers have as between themselves and with the officers of the same rank in the line. Thus—

"The officers of the staff corps of the Navy shall take precedence in their several corps and in their several grades and with officers of the line with whom they hold relative rank, according to length of service in the Navy."

That is, officers of the same rank shall, as between themselves, take *precedence* according to their length of service. Thus, a captain in a staff corps will take precedence of a captain in the same, or a different corps, or a captain in the line whose service in either case has been for a shorter time than his. But in estimating this length of service the staff officer is, under section 1486, credited with six years more of service than the line officers, thus giving the staff officer precedence of the line officer of the same rank who have not served six years more than he; while, as between staff officers, actual length of service determines the order of precedence.

But there is nothing in these sections which gives to length of service, either actual or comparative, the effect of promoting an officer to a higher actual rank. Promotions in rank are regulated by different provisions. They merely fix the relative rank or precedence between officers of the same rank, and who, but for this, would have been equal in rank and precedence. And the use of the word "precedence" instead of "rank" is also significant as showing that this was the purpose of the section.

By section 2 of the navy personnel act (30 Stat., 1005) engineer officers with the rank of captain, commander, or

lieutenant-commander, take rank in the line of the Navy according to the date at which they attained such relative rank. But, as this act transfers the engineer corps to the line, and refers only to rank in the line, I do not think this provision of importance to the question here considered.

The officers here referred to were on the retired list before and at the passage of the act of 1906, and no claim is made that they were not retired with the rank to which they were entitled. And it appears to be certain that, by the express terms of the act, that rank which they then actually held is the rank from which whatever advancement is contemplated must be made.

There are two answers to the claim made that the rank and status of these officers are affected by the promotion of their date men on the active list.

By the act of March 2, 1867 (14 Stat., 517), it is enacted:

"That officers on the retired and reserve lists of the Navy shall be entitled to promotions as their several dates upon the active lists are promoted; but such promotions shall not entitle them to any pay."

But by the act of August 5, 1882 (22 Stat., 286), it is provided—

"Hereafter there shall be no promotion or increase of pay in the retired list of the Navy, but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired."

And that the officers here considered are not entitled to any promotion, under the act of June 29, 1906, by reason of the promotion of their date men, or because of any vacancy, is made certain by the express terms of that act, which makes the rank actually held at retirement the basis of any advancement. It is, therefore, my opinion that the rank and status to which these officers are entitled are not affected by anything which has transpired in the active list in the way of promotion or vacancy since their retirement. And I am quite unable to see that sections 1485 and 1486, Revised Statutes, have anything whatever to do in determining whether their advancement should be that of one rank or more than one, or that they interfere with or affect the usual order of promotion of such officers in the Navy.

I have, therefore, to advise you that these officers should have been each advanced with the rank of the next higher grade, which is next above the rank held by him at retirement, for I have no doubt that Congress intended an advancement of but one rank.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE NAVY.

CIVIL SERVICE LAW—TEMPORARY APPOINTMENTS.

The temporary force of employees, *to be selected and employed* by Secretary of the Interior, as provided in the act of June 22, 1906 (34 Stat., 429, 430), for the reproduction of the records and files of the offices of surveyor-general and register and receiver of the land office at San Francisco, Cal., which were destroyed by the earthquake and fire, and the persons to be *selected* by the Secretary of the Interior, under the act of March 4, 1907 (34 Stat., 1333), to make transcripts of records and plats in the General Land Office, must be appointed as a result of open competitive examinations, held under the provisions of the civil service law.

Under the existing civil service rules, all places in the executive civil service, except those mentioned in Schedule "A" and except persons employed merely as laborers and persons whose appointments are subject to confirmation by the Senate, must be appointed as a result of open competitive examinations, held under the provisions of law.

Congress may at any time it deems proper exempt any position or any class of positions from the operation of the civil service act, but to do this it must use language indicating clearly and affirmatively its intention to do so.

Where Congress in an appropriation act makes use of the very term employed in the civil service act in describing appointments to be made in accordance with its provisions, it is manifest that there was no intention to waive the requirements of the civil service law.

Congress may prescribe qualifications for office and require that appointments shall be made from among those who have shown by proper tests to have those qualifications.

DEPARTMENT OF JUSTICE,
February 12, 1908.

SIR: Upon the request of the Civil Service Commission you have transmitted for my consideration and opinion certain papers in relation to the classification, by Executive

order, of 62 persons employed in the General Land Office as a temporary force.

Of your power to classify these persons there can be no question, but I understand that my opinion is desired as to their status, or more particularly as to the effect of the acts providing for their employment. These acts read as follows:

"For temporary force, *to be selected and employed by the Secretary of the Interior*, for the reproduction of the official records of United States surveys, tracings of township plats, diagrams, copying of field notes, and correspondence, constituting the records and files of the offices of surveyor-general and register and receiver at San Francisco, California, which were destroyed by earthquake and fire on the eighteenth day of April, nineteen hundred and six, namely: Twelve clerks, qualified as draughtsmen, at one thousand two hundred dollars per annum each; fifty copyists, at nine hundred dollars per annum each; and one messenger at six hundred dollars per annum; in all, sixty thousand dollars, to be immediately available." (34 Stat., 429, 430.)

"TRANSCRIPTS OF RECORD AND PLATS, GENERAL LAND OFFICE: For furnishing transcripts of records and plats, to be expended under the direction of the Secretary of the Interior, eighteen thousand seven hundred and twenty dollars: *Provided*, That persons employed under this appropriation *shall be selected by the Secretary of the Interior* at a compensation of two dollars per day while actually employed, at such times and for such periods as the exigencies of the work may demand." (34 Stat., 1333.)

That Congress may prescribe qualifications for office, and require that appointments shall be made from among those who have been shown by proper tests to have those qualifications, is well settled (13 Op., 516). It is equally clear that by the enactment of section 1753, Revised Statutes, and of the civil service law (22 Stat., 403), Congress authorized the President to make rules which should be binding on appointing officers in the Executive Departments.

Acting under this authority you have promulgated a rule which reads as follows:

"The classified service shall include all officers and employees in the executive civil service of the United States, heretofore or hereafter appointed or employed, in positions now existing or hereafter to be created, of whatever function or designation, whether compensated by a fixed salary or otherwise, except persons employed merely as laborers, and persons whose appointments are subject to confirmation by the Senate." (Rule 2, Civil Service Rules, April 15, 1903.)

Under this rule the employees of the General Land Office referred to in the communication of the Civil Service Commission are clearly in the competitive classified service, unless the sections of the statute providing for their employment specifically takes them out.

If these statutes and the civil service act can be read together so as to give effect to both, such course must be adopted. In the case of *Frost* v. *Wenie* (157 U. S., 58), Mr. Justice Harlan, speaking for the court, said:

"* * * And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. *In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute.*"

Manifestly the statutes now under consideration can all be read together, and that being so it is the duty of courts and executive officers to adopt the construction which permits this.

In 25 Op., 343, my predecessor, Attorney-General Moody, said:

"And I deem it equally certain that when a general law prescribes what persons may be appointed to any class or kind of office or place, the time or manner of their appointment, the tenure of their office, their qualifications or the test of their qualifications and fitness, any appoint-

ment of that kind thereafter authorized, must, unless otherwise provided, be made with reference to and in conformity with the requirements of such general law. I think it a mistake to suppose that, in order to bring such appointments within the purview of the general law, it would be necessary to state specifically in the act authorizing them that they are to be made as thus prescribed, or as provided by law, or that such idea be expressed in any form. *On the contrary, I think that in order to exempt such appointments from the operation of the general law, a specific exemption therefrom would be required.*

"Indeed, as a general rule, it may be said that in every statute authorizing or requiring a certain act there is implied, as if there written, the direction that such act shall be done with reference to and in conformity with existing laws on the subject, if there are any. All laws in *pari materia* should be construed together, and so as to give force and effect to all and to not conflict with each other.

"Nor can I agree with the contention that the clauses above quoted of the appropriation act either repeal by implication or in anywise modify any portion of the civil service act. Indeed, I see nothing in the clauses quoted at all incompatible or inconsistent with the civil service act. Both may stand and operate together. The former gives to the Superintendent of the Military Academy the power to appoint the engineer and assistant engineer, and the latter prescribes a class from which such appointees must be selected."

It is true that, in a subsequent opinion, he held (25 Op., 414) that when the phraseology of the appropriation act for the ensuing year was changed so that it read that the employees, in regard to whose status the earlier opinion was rendered, should be "selected and appointed" by the Superintendent, the words used were sufficient to take them out of the operation of the civil service law. He said:

"The change of language in this appropriation, following, as it does, the promulgation of the opinion of this Department that the provisions of the act of 1904 did not authorize the appointment of the persons appropriated for, without reference to the civil service, is significant and controlling as to the intent of Congress."

The opinion did not hold, however, that the mere use of the word "selected" was sufficient in itself to authorize the appointing officer to choose the employees without regard to the civil service rules. In that instance Congress had first made an appropriation for "an engineer * * * to be appointed by the Superintendent of the United States Military Academy." The Atorney-General held that the use of the word "appointed" was not sufficient to except the position from the operation of the civil service rules. The year after this opinion had been given Congress again made an appropriation for the salary of an engineer, following the language of the earlier act word for word except for the provision that he should be "selected and appointed" by the Superintendent. Manifestly it was intended in some way to change the method of appointment, and the most reasonable supposition was that the place was to be filled by the Superintendent without regard to the civil service regulations.

I have also considered the opinion of Attorney-General Griggs (22 Op., 556), but find nothing there decided which is inconsistent with what I have previously said. The section there under consideration, which was part of the bill making appropriations for the sundry civil expenses of the Government, reads as follows:

"Office of the Secretary: For temporary typewriters and stenographers in the Department of State, to be selected by the Secretary, two thousand dollars, to be immediately available."

The opinion of Mr. Griggs was that under this section appointments could be made without regard to the civil service rules. This opinion rested on the ground that the services were "extraordinary and unusual" and that "the Secretary should be unimpeded in his speedy selection of his force." The act was passed during the Spanish war, when a considerable number of appointments had been expressly authorized by Congress without compliance with the civil service rules. In view of the combination of exceptional circumstances existing at the time it is altogether probable that Congress intended to allow the Secretary of State the same latitude that had been given others.

No such extraordinary circumstances exist here.

The civil service act itself provides, section 2, paragraph 2, clause 2, that "all the offices, places, and employments so arranged or to be arranged in classes shall be filled by *selections* according to grade from among those graded highest as the results of such competitive examinations."

Where Congress in an appropriation act makes use of the very term employed in the civil service act in describing appointments to be made in accordance with its provisions it is manifest that there was no intention to waive the requirements of the latter statute.

I am of opinion, therefore, that under the existing civil service rules all places in the executive civil service, except those mentioned in schedule "A," and except persons employed merely as laborers, and persons whose appointments are subject to confirmation by the Senate, must be appointed as a result of open competitive examinations, held under the provisions of the law. Congress may, of course, at any time it deems proper, exempt any position or any class of positions from the operation of the act, but to do this it must use language indicating clearly and affirmatively its intention that the civil service rules should not be applied.

Respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

AFFIXING CORPORATE SEALS TO BONDS — ACKNOWLEDGMENT.

A corporation may adopt for the purpose and use a seal other than its corporate seal on a bond so as to make the bond a corporate deed of the corporation.

An agent of a corporation, appointed by an instrument under the corporate seal of the corporation, may, on its behalf, adopt a special seal so as to make it, in executing the purpose for which he was appointed, the corporate seal of the corporation.

An acknowledgment of a bond is not necessary.

DEPARTMENT OF JUSTICE,

February 15, 1908.

SIR: I have the honor to acknowledge receipt of your letter of the 27th ultimo, in which you ask my opinion

as to the necessity of affixing corporate seals to bonds executed by corporate principals or sureties in cases where such corporations are provided with seals, and whether it is desirable that bonds be acknowledged in any case.

As I understand your first question, it involves the following points:

1. Supposing a corporation to have a corporate seal formally adopted as such by the legal act of the corporation, can it use another seal on a bond so as to make such bond a corporate deed of the said corporation by adopting said other seal as its corporate seal for this special occasion?

2. If the first question be answered in the affirmative, can an agent of the corporation appointed for the purpose by an instrument itself under the corporate seal, adopt, on behalf of the corporation, the special seal above mentioned so as to make it, for the particular occasion, the corporate seal of the corporation?

The term bond *ex vi termini* imports a sealed instrument, and, as a general rule, independent of any statute providing otherwise, sealing is necessary to constitute a perfect bond. (5 A. & E. Encyc. Law, 2d ed., 736; *State* v. *Humbird*, 54 Md., 327; *Chilton* v. *People*, 66 Ill., 501; *Barnet* v. *Abbott*, 53 Vt., 120.)

The seal is not a mere formality of execution but a matter of substance, which gives to the paper certain legal effects which can not be attached to an unsealed paper. (*Harman* v. *Harman*, 11 Fed. Cas., 530. See also *U. S.* v. *Linn*, 15 Pet., 290, 311; and *Moses* v. *U. S.*, 166 U. S., 580.)

In *Mill Dam Foundry Co.* v. *Hovey* (21 Pick., 428) the Supreme Court of Massachusetts said:

"Now seals are in fact affixed to the instrument produced, and the legal presumption is that they were placed there as the seals of the parties. That presumption must prevail until it is rebutted by competent evidence.

"It has been said that the seal does not appear to be one of a corporation. But a corporation, as well as an

individual person, may use and adopt any seal. They need not say that it is their common seal."

If a seal is necessary to a corporate contract and authority is shown from the corporation to attach its seal thereto, it is by no means indispensable that use should be made of the common seal of the corporation. Any other seal would have the same effect if adopted by the corporation, and this is ordinarily established by showing authority to execute a contract on behalf of the company under seal, and the fact of attaching some seal to the name of the corporation with the intent to seal on its behalf. (A. & E. Encyc. Law, 2d ed., vol. 7, p. 692; *Eureka Co.* v. *Bailey Co.*, 11 Wall., 491; *Tenney* v. *Lumber Co.*, 43 N. H., 343, 350; *Baptist Society* v. *Clapp*, 18 Barb. (N. Y.), 49.)

In the case of the *District of Columbia* v. *Camden Iron Works* (181 U. S., 460) the Supreme Court, concurring in the decision in *Mill Dam Foundry Co.* v. *Hovey* (21 Pick., 428), said:

"As to private corporations, where authority is shown to execute a contract under seal, the fact that a seal is attached with intent to seal on behalf of the corporation is enough though some other seal than the ordinary common seal of the company should be used. (*Railroad Co.* v. *Hooper*, 160 U. S., 518; *Stebbins* v. *Merritt*, 10 Cush., 27, 34; *Bank* v. *Railroad Co.*, 30 Vt., 159; *Tenney* v. *Lumber Co.*, 43 N. H. 343; *Porter* v. *Railroad Co.*, 37 Maine, 349.)"

The authorities cited hold that a corporation may use and adopt a seal other than its corporate seal, so as to make such bond a corporate deed of the corporation. I, therefore, answer the first question in the affirmative.

The expressed intention of the corporation under its seal is to authorize the agent to execute the bond, to sign the corporate name, so as to lawfully bind the corporation to all intents and purposes as if done by the duly authorized officers of the corporation.

In general, a principal is bound by the acts of his agents within the authority actually given, which includes not

only the precise act expressly authorized, but also whatever usually belongs to the doing of it, or is necessary to its performance. (A. & E. Encyc. Law, 2d ed., vol. 1, p. 988; *Le Roy* v. *Beard*, 8 How., 467; *Caswell* v. *Cross*, 120 Mass., 545; *Webster* v. *Clark*, 30 N. H., 245; *Parker* v. *Saratoga County*, 106 N. Y., 392.)

The corporation having a seal, the authority granted the agent to sign its name and to execute the bond carries with it the authority to affix the seal of the corporation, or a seal adopted by the corporation, and thus complete the execution of the bond.

As we have seen, a corporation may use its common seal or may adopt another or special seal. The fact that the agent, upon his own initiative, adopts a seal in behalf of the corporation and uses that seal, or uses a seal adopted and furnished by the corporation, would not affect the validity of the bond, if authority, under seal, to execute the bond is in evidence and some seal is attached to the bond with intent to seal in behalf of the corporation.

The second question is also answered in the affirmative.

As to your remaining question, an acknowledgment is the act of one who executes a deed in going before some competent officer or court and declaring it to be his act and deed. The functions of an acknowledgment are twofold, to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded. (Bouvier's Law Dict. (Rawle), 66; see also *Insurance Co.* v. *Nelson*, 103 U. S., 544; *Hitz* v. *Jenks*, 123 U. S., 297.)

Bonds differ from deeds in that the former are not required to be recorded. For that reason no acknowledgment as to them is, in my opinion, necessary.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

ADDITIONAL PASSED ASSISTANT AND ASSISTANT PAYMASTERS—DISTRIBUTION IN GRADES.

The number of passed assistant and assistant paymasters in the Navy to be appointed in each of the two grades under the act of March 3, 1903 (32 Stat., 1197), not being prescribed by that act, is necessarily left to Executive discretion, to be controlled by the general terms and regulations providing for the advancement of officers in the naval service.

Nor is it required that the relative proportion of officers in each of those two grades shall remain always the same, a change in the proportion being within the discretion of the Executive, unless controlled by general laws or regulations.

DEPARTMENT OF JUSTICE,
February 19, 1908.

SIRS: I have the honor to respond to the request made in your letter of February 17, 1908, for an official opinion upon the case there stated.

It appears that the act of March 3, 1903 (32 Stat., 1197), provides:

"There shall be * * * twenty-six additional passed assistant and assistant paymasters, in all ninety-six," in the active list of the Navy.

The act nowhere defines the number of those officers, which are to be added to each of the two grades, but merely the number which, in the aggregate, are to be added to both, and your question is, "whether, in view of the statute cited, * * * the advancement of assistant paymasters to the grade of passed assistant paymaster may be determined by Executive discretion, upon nomination by the President and confirmation by the Senate."

This question must be answered in the affirmative, with the proviso that such discretion is controlled by the general terms and regulations providing for the advancement of officers in the naval service, and is not affected by the act of March 3, 1903.

As the act referred to does not prescribe the number of officers to be added in either of the two grades, this is necessarily left to Executive discretion in view of all the circumstances and exigencies of the service. And it is not required that the relative proportion of officers in these

grades shall remain always the same; any change in this proportion is within the discretion of the Executive unless controlled by general laws or regulations.

In brief, the act of March 3, 1903, does nothing more than add a certain number in the aggregate to the officers in these two grades, and leaves any other question to be governed by the general laws and regulations of the naval service and the determination of the President.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE NAVY.

GOVERNMENT HOSPITAL FOR INSANE — MAINTENANCE OF INSANE INMATE OF NATIONAL SOLDIERS' HOME.

Where an inmate of the National Soldiers' Home becomes insane and is transferred to the Government Hospital for the Insane, the pension received by such inmate is to be devoted to his maintenance and treatment at the hospital; and the excess cost of such maintenance and treatment over the amount of his pension is to be paid from funds appropriated for such hospital.

DEPARTMENT OF JUSTICE,
February 20, 1908.

SIR: In your letter of the 8th instant, to which I have the honor to reply, you request my opinion whether, in case an inmate of the National Soldiers' Home becomes insane and is transferred to the Government Hospital for the Insane for maintenance and treatment, and his pension does not equal the cost of such maintenance at the established rate of $6.66 per month, the excess of such cost over the amount of the pension should be paid from the funds of said home, or from those of the Government Hospital.

The act of July 7, 1884 (23 Stat., 213), expressly provides for the admission into the Government Hospital for the Insane, and for the maintenance and treatment there, of inmates of the National Soldiers' Home who have become insane. And the act further provides that the cost of such maintenance and treatment shall be borne by said home.

It is obvious that, unless the act of February 20, 1905 (33 Stat., 731), has provided differently as to insane inmates of the National Home, the entire cost of this maintenance and treatment in the Government Hospital must be borne by the National Home, as provided in the act of July 7, 1884 (*supra*), and the question here is as to the extent to which this later act has changed this provision.

The first portion of this act relates only to insane inmates of volunteer soldiers' homes and provides for their admission into the Government Hospital, but some of its provisions seem to have a broader application and to apply to all inmates of the hospital, including those from the National Soldiers' Home. Thus—

"During the time that any pensioner shall be an inmate of the Government Hospital for the Insane all money due or becoming due upon his or her pension shall be paid by the pension agent to the superintendent of the hospital, upon a certificate by such superintendent that the pensioner is an inmate of the hospital and is living, and such pension money shall be by said superintendent disbursed and used, under regulations to be prescribed by the Secretary of the Interior, for the benefit of the pensioner, and, in the case of a male pensioner, his wife, minor children,and dependent parents, or, if a female pensioner, her minor children, if any, in the order named, and to pay his or her board and maintenance in the hospital; the remainder of such pension money, if any, to be placed to the credit of the pensioner."

It is manifest that the words "during the time that any pensioner shall be an inmate of the Government Hospital for the Insane, all money due or becoming due upon his or her pension" apply, in their ordinary sense, as well to those inmates from the National Soldiers' Home as to those from the homes for volunteer soldiers. That this expression is not restricted to the latter class is also manifest from the fact that, in the latter portion of the act, provision is expressly made for the disposition of the pensions of such inmates from the volunteer homes. And in the case of *Logue* v. *Fenning*, recently decided in the court of

appeals for the District of Columbia, it is held that this language should be taken as it reads and to apply to all insane pensioners in the Government Hospital.

Taking this as the correct interpretation, it is clear that this act takes from the National Soldiers' Home the pension of an insane inmate who is transferred to the hospital, and devotes, as far as necessary under such regulations as may be prescribed, to his maintenance and treatment at the hospital, thus making the only provision that Congress then desired to make for such maintenance. The Congress did not therefore then leave still in force the provision of the act of July 7, 1884, that all the expense of such maintenance should be borne by the soldiers' home. And if this provision was not thus left in force it follows that it is not in force as to any excess of such cost of maintenance over the amount of a pension.

I do not see how these two provisions for the payment of this cost of maintenance and treatment can stand together; and I am of opinion that, in the act of 1905, Congress made all the provisions that it intended for the cost of maintenance and treatment of insane inmates of the National Soldeirs' Home at the Government Hospital, so that they must be there maintained and treated, as required by law, whether the several amounts of their pensions are sufficient to pay therefor or not; and that the cost thereof should be paid from funds appropriated for the hospital, except so far as paid from pensions.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

STATE DEPARTMENT—COST OF PRINTING SLIP LAWS.

The cost of printing in slip form the 500 copies of all laws furnished the State Department under section 56 of the act of January 12, 1895 (28 Stat., 609), should not be charged against the allotment of appropriation for printing and binding for that Department.

The phrase "documents or reports," as used in the resolution of March 30, 1906 (34 Stat., 825), prescribing the appropriation or allotment out of which the cost of printing and binding of docu-

ments or reports emanating from the Executive Departments, bureaus, and independent offices of the Government shall be paid, is restricted to "Executive documents and reports," and does not embrace the printed laws authorized by section 56 of the act of January 12, 1895.

Neither does the language of paragraph 7 of the act of March 1, 1907 (34 Stat., 1013), prescribing the appropriation or allotment out of which the cost of printing any document or report thereafter printed by order of Congress shall be paid, when read in connection with section 56 of the act of January 12, 1895, refer to statutes, resolutions, or treaties.

DEPARTMENT OF JUSTICE,
March 3, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of February 19, in which you request my opinion relative to the legality of the charge by the Public Printer against the allotment of the State Department for paper and press work on the copies of an act of Congress furnished the State Department.

The facts are that the State Department, being the custodian of the original laws and treaties, and charged by the statutes with their promulgation (sections 210, 3803, 3805, Revised Statutes), has customarily received from the Public Printer, under section 56 of the printing act of 1895 (28 Stat., 601, 609) covering the printing and distribution of public and private laws, 500 copies of all laws, for which no charge has heretofore been made against the allotment of the State Department. But recently the Public Printer has construed the resolution of March 30, 1906, as requiring him to charge against the allotment for printing and binding for the State Department the cost of the 500 copies of the laws distributed to that Department under the act of 1895, and he has announced his intention of continuing to make this charge in accordance with his construction of the law.

The resolution of 1906 (34 Stat., 825) provides:

"That hereafter, in the printing and binding of documents or reports emanating from the Executive Departments, bureaus, and independent offices of the Government, the cost of which is now charged to the allotment for printing and binding for Congress, or to appropriations or

allotments of appropriations other than those made to the Executive Departments, bureaus, or independent offices of the Government, the cost of illustrations, composition, stereotyping, and other work involved in the actual preparation for printing, apart from the creation of manuscript, shall be charged to the appropriation or allotment of appropriation for the printing and binding of the Department, bureau, or independent office of the Government in which such documents or reports originate; the balance of cost shall be charged to the allotment for printing and binding for Congress, and to the appropriation or allotment of appropriation of the Executive Department, bureau, or independent office of the Government, in proportion to the number delivered to each. * * *"

It seems to me patent upon the face of the resolution that it does not refer at all to the laws defined and provided for by section 56 of the printing act of 1895, but only to *executive* documents or reports. Indeed, it seems that the phrase "documents or reports" would not embrace the printed laws. For example, section 54 of the act of 1895 provides for the printing and distribution of House and Senate "documents and reports;" section 55 for "bills and resolutions" of the Senate and House; section 56 for "laws and treaties." A paragraph of section 73 (28 Stat., 612, 613) refers to "documents, bills, and resolutions," differentiating them.

But it is not necessary for me to pass upon this point and determine whether the word "document" in the act of 1895 is used specifically, referring only to the so-called legislative and executive documents, or generically like the word "publication" so as to include a bill or act; for however that may be, the resolution of 1906 is certainly restricted to *executive* documents and reports. Consequently, even if "document or report" includes the "laws" of section 56 of the act of 1895, the cost of the printing of the same would be chargeable under paragraph 7 of the act of March 1, 1907 (34 Stat., 1012, 1013), which provides that—

"The cost of the printing of any document or report hereafter printed by order of Congress which can not under the provisions of Public Resolution Numbered Thir-

teen, Fifty-ninth Congress, first session, approved March thirtieth, nineteen hundred and six, be properly charged to any other appropriation or allotment of appropriation already made, it shall, upon the order of the Joint Committee on Printing, be charged to the allotment of appropriation for printing and binding for Congress."

I may add that the language of this paragraph, "the cost of the printing of any document or report hereafter printed by order of Congress," implies very persuasively, read in connection with section 56 of the act of 1895, that the language does not refer to statutes, resolutions, and treaties.

If this act of 1907 does not, however, give authority for charging the cost of printing the laws to the Congressional allotment, because *document or report* does not include *laws*, I am not called upon to point out the appropriation act or other statute (if any exists) which is the affirmative authority for charging the cost of printing the laws in question to the Congressional allotment or any other, but I am very clear in my conclusion that the charge is improperly and illegally made against the State Department under the resolution of 1906. This is not only the proper legal conclusion, in my opinion, upon scrutiny of the law itself, but it accords with the reason and justice of the case, since the State Department is merely the source of supply to Government officers and others for the slip laws and treaties, and is charged with the certification thereof when necessary, and receives the 500 copies prescribed by the law for that purpose and not especially for its own use.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF STATE.

INTERNAL REVENUE OFFICERS—DUTY AS TO TESTIFYING IN CASES OF FRAUD UPON THE REVENUES.

The Commissioner of Internal Revenue has no authority to define and limit the official duties of deputy collectors and internal-revenue agents by providing that, while it shall be a part of their official duties to appear before United States commissioners and Federal grand juries in cases involving frauds against the revenue laws, up to the time when the parties charged are bound over

to or held by a grand jury, after a prima facie case has been made out and the accused has been so bound over or held, such attendance shall not be a part of their official duties, and they should respond, in such cases, as a rule, only to a regular subpœna and attend "simply as a witness."

The Secretary of the Treasury would not be authorized to approve of such a definition and limitation of the duties of deputy collectors and internal-revenue agents, for the reason that section 3163, Revised Statutes, makes it the duty of all such officers to aid in the prevention, detection, and punishment of any frauds in relation to the collection of internal-revenue taxes, and these duties are not finished when a "prima facie case has been made" against the offender.

There is no sound distinction between such officers testifying to facts within their knowledge before a United States commissioner or a Federal grand jury, for the purpose of having the accused bound over to court or indicted, and their afterwards testifying upon the trial in the court.

Section 321, Revised Statutes, while relating generally to "matters pertaining to the assessment and collection of internal revenue," does not authorize a limitation of the duties of internal-revenue officers and agents in special matters otherwise provided by law.

DEPARTMENT OF JUSTICE,
March 10, 1908.

Sir: In a recent letter you state:

"The Comptroller of the Treasury has decided that a deputy collector or other internal-revenue officer, attending before a court or grand jury in the performance of his duty to aid in the punishment of violations of the internal-revenue laws, whether attending there upon the order of his superior officer, or upon the request of the United States attorney, or in response to a subpœna of the court, is to be paid his usual compensation and actual necessary expenses or allowance in lieu thereof from internal-revenue appropriations and not from the judiciary fund; but that when such officer attends before the court or grand jury 'simply as a witness,' and not in the ordinary discharge of his duties to secure the punishment of frauds, he is to be paid as a witness from the judiciary fund.

"The Commissioner of Internal Revenue claims the right to decide when the officer attends before the court or grand jury merely in the performance of his official duty to se-

cure the punishment of offenders and when he appears there 'simply as a witness' and not in the performance of his official duty; and, hence, to substantially decide out of which appropriation the officer is to be paid."

You thereupon request an expression of my opinion "as to whether this claim of the Commissioner of Internal Revenue is well founded, and whether his decision in the premises is conclusive upon the Comptroller."

You also transmit with your letter the papers in a case actually pending in your Department, in which this question has arisen, from which it appears that while the above-mentioned decision of the Comptroller of the Treasury was on June 6, 1907, promulgated by the Commissioner of Internal Revenue, with your approval, as Treasury Circular No. 700, and while the authority of the Comptroller to render this decision is not questioned, the Commissioner of Internal Revenue now desires, if thereto authorized, and subject to your approval, to define and limit the official duties of deputy collectors and internal-revenue agents by providing that, while it shall be a part of their official duties to appear before United States commissioners and Federal grand juries in cases involving frauds against the revenue laws, up to the time when the parties so charged are held or bound over by the United States Commissioner or the grand jury, on the other hand, if their evidence is needed or desired after a *prima facie* case has been made out and the accused has been held or bound over, such attendance will not be required in the discharge of their official duties, and they should, in such case, respond, as a rule only to a regular subpœna, and would attend "simply as witnesses."

If your letter is to be literally construed as merely requesting an expression of my opinion on the question submitted, at the request of the Commissioner of Internal Revenue, and for the guidance, not of yourself but of the Commissioner, I would be constrained to decline to express an opinion thereon, since, under the well-settled precedents of this Department, I am not authorized to give an official opinion at the request of the head of an Executive Department except for his own guidance, in a matter

calling for action on his part, and am not authorized to give such opinion, even at the request of the head of an Executive Department, for the guidance of an officer of such department in a matter which can not or has not come before the head of the Department. (11 Op. 4; 20 Op. 251, 279, 608; 21 Op. 174.)

However, as your letter, when construed in the light of its inclosures, may, as I understand it, be regarded as a request for the expression of my opinion upon the question whether you would be authorized to approve the action which the Commissioner of Internal Revenue desires to take, I have treated it in this light. So treated, I have the honor to advise that, after careful consideration, I am of the opinion that you would not be authorized to approve the definition and limitation of the official duties of deputy and internal revenue agents in the manner proposed.

It is true that section 321 of the Revised Statutes provides that—

"The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue."

This provision, however, while relating generally to "matters pertaining to the assessment and collection of internal revenue," does not authorize, in my opinion, a limitation of the duties of internal-revenue officers and agents in specific matters otherwise provided by law.

Section 3163 of the Revised Statutes as amended by the act of March 1, 1879 (20 Stat., 327, 328), provides, however, that—

"Every collector within his collection district and every internal-revenue agent shall see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto."

It is said by the Comptroller of the Treasury in a memorandum contained in the papers which you have transmitted that "the duty of any officer who is required by law to aid in the prevention, detection, and *punishment* of frauds, etc., is not finished when a 'prima facie case has been made' * * *."

I concur in this statement.

In respect to the duty which the statute imposes upon revenue officers and agents of aiding in the punishment of frauds upon the revenue, I can see no sound distinction between testifying to facts within their knowledge before a United States commissioner or Federal grand jury, for the purpose of having the accused bound over to court or indicted, and that of thereafter testifying upon the trial in the court. There is nothing in the statute which limits their duty of aiding to secure the punishment of offenders to the assistance of the prosecuting officers in making out a *prima facie* case against the offenders, and in fact such assistance would probably in most cases be ineffectively rendered and their duties in the punishment of offenders left incomplete, and often rendered entirely fruitless, unless followed by the giving of testimony upon the trial of the case, where alone the punishment of offenders can be secured.

I am therefore of the opinion that the proposed definition and limitation of the duty of deputy collectors and internal-revenue agents would be in violation of the provisions of section 3163 of the Revised Statutes.

I have noted the statement made by the Commissioner as to the hardship which would result to the Bureau of Internal Revenue by reason of the fact that the expenses of deputy collectors and other internal-revenue agents in attending courts as witnesses have been heretofore customarily paid by the United States marshals out of the judiciary fund and that no estimate was made in the appropriations for the fiscal year 1908 for the amount necessary to pay these fees, under the Comptroller's decision; also his suggestion that, as many prosecutions for violation of the internal-revenue laws have been heretofore compromised on the payment of a specific penalty and all

costs, the expenses of the internal-revenue officers who attended upon the courts can not under the Comptroller's decision be taxed as costs of the court and are hence a loss to the Government, whereas they should have been paid by the defendants.

Clearly, however, neither of these considerations can affect the single question of law which is now involved.

However, without passing upon the question whether witness fees of revenue agents attending as witnesses under subpœna can not still be taxed as costs against a losing defendant, even although such costs, if the Government were unsuccessful, would be paid out of the internal-revenue appropriations rather than out of the judiciary fund, I may add that this difficulty may be obviated in the future by bearing the Comptroller's decision in mind and fixing in future compromises an amount sufficient to reimburse all expenses of this character which may have been incurred by the Government.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

CIVIL SERVICE COMMISSION—APPROVAL OF PROMOTIONS.

There is nothing in the civil-service act of January 16, 1883 (22 Stat., 403), nor in section 4 of the act of August 5, 1882 (22 Stat., 255), which prohibits the Civil Service Commission from approving a promotion, otherwise unobjectionable, where it is informed that the appointing officer expects or intends to assign to the appointee duties not included within the designation given to his position in the specific appropriation providing for his compensation.

Neither is there anything in either of those acts preventing the certification by the Commission of eligibles for a vacancy from registers not designating functions of the nature suggested by the title of the position given in the specific appropriation providing for the compensation of the employee.

The purpose of section 4 of the act of August 5, 1882, was to prevent the expenditure of public money in the employment of subordinate persons at the seat of Government out of appropriations made for general purposes, so as to insure the efficient control by the Congress not only over the amounts of money expended,

but also over the number and character of subordinate officers and employees in the service of the United States employed at the seat of Government.

The act of August 5, 1882, in no wise limits the discretion of the heads of the several Executive Departments as to the character of the work which shall be required of their several employees, but is intended to prevent the employment of subordinate officers or employees at the seat of Government without specific appropriations for their payment.

DEPARTMENT OF JUSTICE,
March 17, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of February 21 last, transmitting a communication from the Civil Service Commission, in which my opinion is asked upon the legal propriety of the Commission's certification of certain employees under the circumstances set forth in its communication. I understand that it is not desired that I express any opinion as to the propriety of such certification under the civil-service rules, but that the questions of law as to which my opinion is asked are whether such certification is prohibited, either by the terms of the civil-service law, or by those of the act approved August 5, 1882 (22 Stat., 219, 255). The certifications in question were requested under the following circumstances:

On April 11, 1906, Richard Lee was appointed messenger boy under the War Department at $360 per annum. On September 25 following he was promoted to watchman at $540 per annum, the minimum age limit fixed by the rules for such positions being waived by the Commission. On September 7, 1907, he was promoted from watchman at $540 to elevator conductor at $600 per annum. It appears from the statement of the Commission that there is a specific appropriation for an elevator conductor at this compensation, but, in the opinion of the War Department, there is no necessity for Lee's services in connection with the running of any elevator, and that the purpose of the War Department, as stated in an official communication to the Commission, is to have Lee continue to discharge the same duties which have been assigned to him from

the time of his original appointment as messenger boy. The Commission doubts its authority to approve this promotion.

In the second case, the Commission, at the request of the Treasury Department, certified eligibles from its register of stenographers and typewriters to fill a vacancy in the position of assistant messenger. Upon inquiry from the Commission as to why this requisition was made, the Treasury Department explained that an assistant messenger had much time when he was not actively employed as a messenger, and, during this time, he could be employed as a stenographer and typewriter when otherwise he would simply be sitting idle. A further reason appears to have been given for the request, which seems to me irrelevant to the legality of the Commission's action. In this case, as in the other, I understand that there was a special appropriation for the compensation of an assistant messenger.

The third case mentioned by the Commission relates to a requisition from this Department that two positions for which there are special appropriations as skilled laborers should be filled, one from the messenger register and the other from the messenger-boy register. It is proper for me to state in this connection that the Commission appears to have been under some slight misapprehension as to the facts, but, for the purpose of answering the questions of law submitted to me, I do not deem it material to correct this error.

It is apparent from the foregoing statements that the Commission wishes to be informed—

First. Whether it is authorized to approve a promotion, otherwise unobjectionable, if it is informed that the appointing officer expects or intends to assign to the appointee duties not included within the designation given to his position in the specific appropriation providing for his compensation.

Second. Whether the Commission is authorized to certify eligibles for a vacancy from registers not designating functions of the nature suggested by the title of the posi-

tion given in a specific appropriation providing for the compensation of the employee.

It will be observed, of course, that these questions assume that, in so far as the Commission may have a discretion in the premises, it will approve the promotion or make the certification desired; the inquiry being not whether it is bound to do this, but whether it is permitted to do this under the circumstances.

I find nothing in the civil-service law which prohibits this action. By section 6 provision is made for the classification of "clerks, agents, or persons employed," and for subsequently including "subordinate places, clerks, and officers in the public service" within such classification as from time to time revised; and section 7 provides "that after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith." It is likewise provided by section 2 "that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations."

These are all the provisions of the civil-service law which have any bearing upon the questions under consideration, and it seems quite clear that they contain no prohibition, either express or arising from reasonable implication, against compliance by the Commission with any one of the several requests mentioned in the statement of facts.

The only other statute which is supposed to have any bearing upon the question is section 4 of the act approved August 5, 1882 (22 Stat., 255), making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ended June 30, 1883, and for other purposes. This section is as follows:

"SEC. 4. That no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman,

laborer, or other employee shall after the first day of October next be employed in any of the Executive Departments, or subordinate bureaus or offices thereof at the seat of government, except only at such rates and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year; and no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall hereafter be employed at the seat of government in any Executive Department or subordinate bureau or office thereof or be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation, and then only for services actually rendered in connection with and for the purposes of the appropriation from which payment is made, and at the rate of compensation usual and proper for such services, and after the first day of October next section one hundred and seventy-two of the Revised Statutes, and all other laws and parts of laws inconsistent with the provisions of this act, and all laws and parts of laws authorizing the employment of officers, clerks, draughtsmen, copyists, messengers, assistant messengers, mechanics, watchmen, laborers, or other employees at a different rate of pay or in excess of the numbers authorized by appropriations made by Congress, be, and they are hereby, repealed; and thereafter all details of civil officers, clerks, or other subordinate employees from places outside of the District of Columbia for duty within the District of Columbia, except temporary details for duty connected with their respective offices, be, and are hereby, prohibited; and thereafter all moneys accruing from lapsed salaries, or from unused appropriations for salaries, shall be covered into the Treasury; * * * and nothing herein shall be construed to repeal or modify section one hundred and sixty-six of the Revised Statutes of the United States."

It seems evident that the purpose of this provision was to prevent the expenditure of public money in the employment of subordinate persons at the seat of government out

of appropriations made for general purposes, so as to insure the efficient control by the Congress not only over the amounts of money expended, but also over the number and character of subordinate officers and employees in the service of the United States, and employed at the seat of Government. This is the construction placed upon the act by the Court of Claims in the case of *Plummer* v. *United States* (24 Ct. Cls., 517, 520), in which the court says:

"The purpose of Congress in these provisions can not be mistaken. It is to deprive officers of the Government of all authority to employ in any of the Executive Departments *at the seat of government*, or in the subordinate bureaus or offices thereof, civil officers, clerks, draughtsmen, copyists, messengers, assistant messengers, mechanics, watchmen, laborers, *or other employees*, except such as may be specifically appropriated for by Congress."

In conformity with this decision, it is held in the opinion of the Comptroller, cited by the Civil Service Commission in its statement (10 Comp. Dec., 3) that the Congress, having made a specific appropriation for one confidential clerk to the Secretary of the Navy, the employment of a second confidential clerk to be paid for out of the appropriation "Increase of the Navy," was forbidden by this statute. It will be observed, however, that in none of the four cases mentioned by the Commission is there any statement or suggestion of a purpose on the part of the head of a Department to employ any officers or employees at rates or in numbers not specifically provided for by the Congress, or to pay any officers or employees whose employment is not authorized and payment for whose services is not specifically provided for in a law granting an appropriation, or to pay any officer or employee except for services actually rendered in connection with, and for the purposes of, the appropriation from which payment is made, and at the rate of compensation usual and proper for such services. What would be the rights or duties of the Civil Service Commission if a request for a certification of eligibles, or the approval of a promotion, were coupled with a statement that the officer or employee

would be employed and paid in contravention of this statute, it is not necessary for me to discuss, since it is quite clear that no such intention is avowed by any one of the three heads of Department making the requests set forth by the Commission. In the first two of the requests mentioned, the statement is made that it is intended to utilize the employees, the one during the whole, and the other during a part, of his time in the discharge of duties differing from those immediately suggested by the names of the places appropriated for by the Congress; but I find no prohibition of such employment in the act of 1882, above quoted. If an elevator were out of repair for some days or weeks, there is surely nothing in this statute to prohibit the head of the Department from using the elevator conductor as a messenger, and, if he finds it unnecessary or undesirable to use the elevator at all, but needs the services of the employee for other legitimate purposes of the appropriation from which the payment is made, there is nothing in the statute quoted which prevents him from doing this. It is yet more evident that when, as in the second case, the services of an employee described as a messenger are needed, as such services naturally would be, only intermittently, the head of the Department is not obliged to let him pass the remainder of the time for which the Government pays him, in idleness, and is justified in employing him for other legitimate purposes of the appropriation from which he is paid. Indeed, since by several statutes (22 Stat., 563; 27 Stat., 715; 30 Stat., 316) it has been made the duty of heads of Departments "to require of all clerks and other employees, of whatever grade or class, in their respective Departments, not less than seven hours of labor each day," it seems clear that the spirit, if not the letter of the law obliges the heads of Departments to prevent, so far as may be in their power, their subordinates from passing any of the time for which they are paid by the Government in idleness. In the cases of the two skilled laborers, certifications for which are said to have been requested from the eligibles on the register of messengers and messenger boys, respectively, in addition to what has been said in regard to the other cases, it should

be further noted that the terms "skilled laborer," "messenger," and "messenger boy" are not sufficiently differentiated to render the description of the same employee by one or the other title necessarily inappropriate.

I construe the act of 1882 as in no wise limiting the discretion of the heads of the several Executive Departments as to the character of work which shall be required of their several employees, but only as intended to prevent the employment of subordinate officers or employees at the seat of Government without specific appropriations for their payment, and I am strengthened in this construction by the concluding words of the section above noted, which are:

"* * * and nothing herein shall be construed to repeal or modify section one hundred and sixty-six of the Revised Statutes of the United States."

When this act was passed section 166, Revised Statutes, read as follows:

"Each head of a Department may from time to time alter the distribution among the various bureaus and offices of his Department, of the clerks allowed by law, as he may find it necessary and proper to do."

While this provision did not then apply to employees other than clerks, nevertheless the fact that its repeal was expressly negatived tends strongly to show that the Congress had no purpose to prevent, by the enactment first referred to, the heads of the several Departments from so employing the services of their respective subordinates as to best advance the public interests. To avoid possible misconstruction, it is proper that I should call attention to the subsequent modification of section 166, which, as amended by the act approved May 28, 1896 (29 Stat., 179), now reads as follows:

"Each head of a Department may from time to time alter the distribution among the various bureaus and offices of his Department, of the clerks and other employees allowed by law, except such clerks or employees as may be required by law to be exclusively engaged upon some specific work, as he may find it necessary and proper to do, but all details hereunder shall be made by written order

of the head of the Department, and in no case be for a period of time exceeding one hundred and twenty days: *Provided*, That details so made may, on expiration, be renewed from time to time by written order of the head of the Department, in each particular case, for periods of not exceeding one hundred and twenty days. All details heretofore made are hereby revoked, but may be renewed as provided herein."

As amended, the statute extends the discretion previously vested in the head of each Department as to the distribution of clerks among the various offices and bureaus of his Department to all other employees, but regulates the exercise of this discretion by requiring the special written order of the head of the Department for each one hundred and twenty days at most of employment of each employee outside of the bureau or office to whose appropriation he is charged. This provision must be read in connection with section 3662, Revised Statutes, originally enacted by the act approved March 3, 1855 (10 Stat., 670), which is as follows:

"All estimates for the compensation of officers authorized by law to be employed shall be founded upon the expressed provisions of law, and not upon the authority of Executive distribution."

These several provisions show that the Congress has considered the proper limits of Executive discretion in determining the character of work to be assigned to subordinates in the several Departments, and has provided safeguards sufficient, in its judgment, against possible abuse of this discretion. It has not, however, seen fit to require any services, or impose any duty, in connection with such safeguards, upon the Civil Service Commission, and I, therefore, advise you that the Civil Service Commission is authorized to comply with all of the several requests for the certification of eligibles, or approval of promotions, mentioned in its letter to you.

Very respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

CUSTOMS LAW—DRAWBACK—COAL USED ON AMERICAN VESSELS.

Continuous customs custody is not essential to the allowance of drawback, under paragraph 415 of the tariff act of July 24, 1897 (30 Stat., 190), on coal imported into the United States and afterwards used for fuel on board of vessels registered under the laws of the United States, propelled by steam, and engaged in trade with foreign countries.

Sections 2977, 2978, and 3025, Revised Statutes, relate exclusively to drawback or return of duties on exported merchandise, and have no application to the allowance of drawback on fuel coal under paragraph 415 of the tariff act of 1897.

DEPARTMENT OF JUSTICE,
March 19, 1908.

SIR: I have the honor to acknowledge the receipt of your letter advising me that the Geo. S. Bush & Co., Incorporated, of Seattle, Wash., has applied to your Department for drawback of duties paid on certain coal which was withdrawn from customs custody after the collection of duties thereon in the district of Great Falls, Mont., and shipped to Seattle for use as fuel on board the steamship *Minnesota*, and requesting an expression of my opinion as to whether this drawback should be allowed.

You say in your letter:

"Paragraph 415 of the tariff act of 1897 provides that on all coal imported into the United States, which is afterwards used for fuel on board vessels propelled by steam and engaged in trade with foreign countries, or in trade between the Atlantic and Pacific ports of the United States, and which are registered under the laws of the United States, a drawback shall be allowed equal to the duty imposed by law upon such coal, and shall be paid under such regulations as the Secretary of the Treasury shall prescribe.

"Drawback is allowed on merchandise withdrawn for exportation under section 2977 of the Revised Statutes, only when the custody of the Government has been uninterrupted. Section 3025, Revised Statutes, provides that no return of the duties shall be allowed on the export of any merchandise after it has been removed from the custody and control of the Government, except in certain cases not affecting the one under consideration.

"The question is presented in this case, whether continuous customs custody is necessary for the payment of drawback on coal used on board vessels under said paragraph 415—that is, whether coal like other merchandise exported in the condition in which imported must have remained continuously in customs custody from the time imported to the time of shipment out of the United States."

I have given this question careful consideration in the light of the various statutory provisions cited by you and the information contained in your subsequent letter as to the practical construction which has been given to this paragraph by the collectors of customs at the several ports.

Paragraph 415 of the tariff act of 1897 (30 Stat., 151, 190) provides:

"That on all coal imported into the United States, which is afterwards used for fuel on board vessels propelled by steam and engaged in trade with foreign countries, or in trade between the Atlantic and Pacific ports of the United States, and which are registered under the laws of the United States, a drawback shall be allowed equal to the duty imposed by law upon such coal, and shall be paid under such regulations as the Secretary of the Treasury shall prescribe * * *."

A similar provision for a drawback of 75 cents per ton on bituminous coal used for fuel on board steam vessels was contained in the tariff act of March 3, 1883 (22 Stat., 488, 511), but was entirely omitted from the tariff acts of October 1, 1890 (26 Stat., 567), and August 27, 1894 (28 Stat., 509).

The regulations for "drawback on coal used for fuel on board steam vessels" which were prescribed by the Secretary of the Treasury under the provisions of paragraph 415 of the act of 1897 are contained in articles 1206 to 1209, inclusive, of the Customs Regulations of 1899. They are similar to the regulations formerly prescribed under the tariff act of 1883, which were contained in articles 951 to 957, inclusive, of the Customs Regulations of 1884. While under both of these regulations it is expressly provided that "imported coal may be taken for fuel on board a departing vessel either before or after the payment of the

duties thereon, at the option of the owner," in neither of them is there any requirement that in order to so use coal on which duty has been previously paid it must have remained in the meantime in customs custody. On the other hand, each of these regulations provides that, in addition to the entry and declaration prescribed, " the collector may also require such additional evidence of the importation and payment of duties as he may deem necessary." (Customs Regulations, 1899, art. 1206; 1884, art. 952.) These provisions, as you state in your recent letter, " apparently contemplate instances in which coal has not continuously remained in customs custody from the date of importation."

Furthermore, in this letter, answering my inquiry as to the practice of the Treasury Department in allowing drawbacks under the provisions of the acts of 1883 and 1897 on coal that had not been in continuous customs custody, you state that the records of your Department do not show any claim to have been presented to it for drawback on coal which had been delivered from customs custody prior to being placed on board the vessel, and that the collectors of customs at New York, Philadelphia, Boston, New Orleans, and Baltimore report that no claim has ever been made at those ports for drawback in such cases; but that " the collector of customs at San Francisco reports * * * that it has been the practice at that port to pay drawback upon coal used in the manner referred to, although the same had been delivered from customs custody prior to its being laden on the vessel using the same, and a similar practice appears to have been followed in the Puget Sound custom collection district." It thus appears that in the only collection districts in which this question has ever been raised it has been the custom to allow the drawback, even though the coal has not been in continuous customs custody subsequent to its importation.

Taking all these matters into consideration, I have the honor to advise that I am of the opinion that continuous customs custody is not essential to the allowance of drawback on the coal in question, for the following reasons:

Paragraph 415 of the act of 1897 provides broadly that a drawback shall be allowed " on all coal imported into

the United States which is afterwards used for fuel on board vessels propelled by steam" engaged in foreign or coastwise trade and duly registered, which "shall be paid under such regulations as the Secretary of the Treasury shall prescribe." It contains no limitation of such drawback to coal which has remained in customs custody between its importation and reshipment, but covers, in apt language, all coal which after being imported is afterwards at any time used for fuel on board certain steam vessels. There is nothing which indicates any intention to limit this provision to coal which has remained in customs custody. On the other hand, the specific authority given the Secretary of the Treasury to prescribe regulations for the payment of such drawback may well cover the case of coal which has not remained in customs custody, and enable the interests of the Government to be safeguarded by the requirement of satisfactory evidence that the coal on which the drawback is claimed is in fact the coal which had been previously imported. It was apparently in accordance with this idea that, both under the act of 1883 and the act of 1897, the regulations prescribed by the Secretary of the Treasury in reference to the allowance of the drawback on coal authorized the collector of customs to require, in addition to the entry and declaration, "such additional evidence of the importation and payment of duties as he may deem necessary."

On the whole, therefore, there appears to be nothing restricting the allowance of drawback under paragraph 415 to coal which has remained in continuous customs custody, unless the broad provisions of this paragraph, which aptly include coal laden on steam vessels after it has been delivered from customs custody as well as coal which has remained continuously in such custody, are to be regarded as limited by sections 2977 or 3025 of the Revised Statutes, to which you have called my attention, or by section 2978, which should likewise be considered in this connection.

Section 2977 provides that merchandise which has remained in customs custody, shall, on exportation directly from such custody within three years, be entitled to return duties. Section 2978 provides that no merchandise sub-

ject to duty "shall be entered for drawback or exported for drawback" after it is withdrawn from customs custody, except as provided in section 3025. Section 3025 provides that "no return of duties shall be allowed on the export of any merchandise after it has been removed from the custody and control of the Government," except in the cases provided in certain sections of the Revised Statutes which are not here material. While each of these sections undoubtedly requires continuous customs custody as a condition to the allowance of drawback or return of duties in the cases to which they relate, I am of the opinion that none of them have any application to the allowance of drawback on fuel coal under paragraph 415, for the reason that they relate exclusively to drawback or return of duties on exported merchandise, and therefore do not in any way affect paragraph 415, which relates only to the shipment of coal for use as fuel on board vessels in such manner as not to constitute an exportation.

Sections 2977 and 3025, by their express language, clearly apply only to the case of exportations. While the meaning of section 2978 is not so obvious, owing to its reference to merchandise "entered for drawback," still in view of the fact that both at the time of the passage of the original act of March 3, 1849 (9 Stat., 399), from which this section was derived, and at the time of its reenactment in the Revised Statutes, there was no provision in the statutes for drawback upon any imported articles except upon their subsequent exportation, it is reasonably certain that the use in this section of the indefinite phrase "entered for drawback," whatever may have been its meaning, was not intended to authorize a drawback upon any except exported articles, and that this section, like the others, applies only to exportations.

It is, on the other hand, clear that the shipment of coal for use as fuel on vessels is not an "exportation" within the meaning of the customs laws. It is well established that an essential element to exportation is the intent to land the article in a foreign country and that the taking of material on board ship merely for consumption during the voyage is not an exportation. (Andrew's Revenue Laws,

sec. 207; Treasury Decisions, 9733, 13536, 18668, 19434; 23 Op., 418.)

In *Swan & Finch Co.* v. *United States* (190 U. S., 143, 145) it was held that the drawback provided by section 30 of the act of 1897 "on the exportation" of articles manufactured from imported materials on which duties had been paid would not be allowed on lubricating oil made from imported rape seed which had been placed on board a vessel bound for a foreign country to be used during the voyage. Mr. Justice Brewer, delivering the opinion of the court, said, referring to the term "exportation:" "Coal placed on a steamer in San Francisco to be consumed in propelling that steamer to San Diego would never be so designated. Another country or State as the intended destination of the goods is essential to the idea of exportation."

For these reasons, therefore, without passing upon the question as to what would have been the effect of sections 2977, 2978, and 3025 of the Revised Statutes upon the later and special provisions contained in paragraph 415 of the tariff act of 1897, if they had related to the same subject, it is evident that as these sections relate solely to exportations, they can have no application to the case of coal shipped for use on board vessels, to which alone paragraph 415 relates.

Hence, as there appears to be no other statutory provision limiting the broad language of paragraph 415, I am of the opinion that, in accordance with the Treasury regulations which have been adopted thereunder and the uniform practice of the customs officers wherever this question has arisen, this paragraph should be so construed as to authorize the drawback on coal otherwise coming within its provisions, where the Treasury regulations have been duly complied with, although such coal has not been in continuous customs custody between the dates of its importation and reshipment.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

RECLAMATION SERVICE—CONTRACTS—MEMBERS OF CONGRESS.

Agreements for the purchase of lands, for water rentals, for conveyance of water rights, and similar instruments, contractual in form, relating to the adjustment of vested water rights, executed in behalf of the United States by some officer of the Reclamation Service for purposes within the purview of the reclamation act (32 Stat., 388), are "agreements" or "contracts" within the meaning of sections 3739–3742, Revised Statutes, which prohibit any Member of Congress from being a party to, or interested in, any contract with, or on behalf of, the United States which is in its nature executory and continuous as to future performance, and require the insertion therein of the condition prescribed by section 3741.

Where the meaning of a statute is fairly plain, the fact that it interferes with the carrying out of the terms of a subsequent statute in a manner probably not contemplated by Congress, cannot be considered. In such cases the legislative intent, even if it were susceptible of legal ascertainment, is of little effect except as it is expressed in legislative enactments, and when so expressed the legal meaning of what is said must be taken to express the legislative intent, whenever that intent is material.

DEPARTMENT OF JUSTICE,
March 20, 1908.

SIR: I have the honor to reply to your letter of March 12, 1908, in which, with its enclosures, you request my official opinion upon the following question, namely:

"Are agreements for the purchase of lands, for water rentals, for conveyance of water rights, and similar instruments, contractual in form, relating to the adjustment of vested water rights, executed in behalf of the United States by some officer of the Reclamation Service for purposes within the purview of the reclamation act (32 Stat., 388) "agreements" or "contracts" within the meaning of Revised Statutes, sections 3739–3742, requiring the insertion of the stipulation in section 3741."

As far as is material here, the sections of the Revised Statutes referred to are as follows:

3739. "No Member of or Delegate to Congress shall directly or indirectly, himself, or by any other person in trust for him or for his use or benefit, or on his account,

undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into in behalf of the United States, by any officer or person authorized to make contracts on behalf of the United States. * * *"

The same section makes anyone who violates it liable to a heavy fine, and avoids all such contracts.

3740. "Nothing contained in the preceding section shall extend, or be construed to extend, to any contract or agreement, made or entered into, or accepted, by any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company; nor to the purchase or sale of bills of exchange or other property by any Member of [or Delegate to] Congress, where the same are ready for delivery, and payment therefor is made, at the time of making or entering into the contract or agreement.

3741. "In every such contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no Member of [or Delegate to] Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon.

3742. "Every officer who, on behalf of the United States, directly or indirectly, makes or enters into any contract, bargain, or agreement in writing or otherwise, other than such as are hereinbefore excepted, with any Member of [or Delegate to] Congress, shall be deemed guilty of a misdemeanor, and shall be fined three thousand dollars."

As far as is material here, those sections are identical with the original act from which they are taken, the act of April 21, 1808 (2 Stat., 484), which was amended by the act of February 27, 1877 (19 Stat., 249), so as to make it apply also to Delegates to Congress.

The language of section 3739 is not that which it would seem natural to use in framing a statute intended to forbid all contracts by Members of or Delegates to Congress, made with or on behalf of the United States, except those specially excepted. Language similar to that in the beginning of section 3742, would seem more appropriate for such purpose. And for this reason, and because of the

language used in other portions, this section might be thought to only forbid that any Member of or Delegate to Congress should be interested in or in part the beneficiary of any contract made by another person with or on behalf of the United States. But the same reason and policy which would dictate this would, equally, at least, forbid that such Member or Delegate should be the sole party in interest in such contract.

Besides this, the language, when carefully considered, makes it clear that the sections were intended to prevent any such Member or Delegate from being in any way a party to such contracts. Thus, section 3739 provides that no such Member or Delegate shall "undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into on behalf of the United States by any officers or persons authorized to make contracts on behalf of the United States."

This plainly forbids any such Member or Delegate to make or be a party to such contract, either by himself or with others. And while section 3741, in saying that in any such contract with the United States there "shall be inserted an express condition that no Member of (or Delegate to) Congress *shall be admitted to any share* or part of such contract or agreement, or to any benefit to arise therefrom," would seem to indicate something different from a contract made directly with such Member or Delegate, yet I do not think this can overcome the plain meaning of the other portions of the sections and especially of section 3742, which provides that—

"Every officer who, on behalf of the United States, directly or indirectly, makes or enters into any contract, bargain, or agreement in writing or otherwise, other than as are hereinbefore excepted, with any Member of [or Delegate to] Congress, shall be deemed guilty of a misdemeanor, and shall be fined three thousand dollars."

This plainly includes every such contract not thus excepted, and, as we can not suppose that it was intended to impose this penalty for an act which the other sections permitted, it must be taken that their prohibition is as broad as is that of this section.

The papers to which you refer and samples of which are transmitted with your note are certainly "contracts" or "agreements" as those words are used in the sections referred to, and as they are executory and continuous in their nature, and for an indefinite future performance, they are not within the exception of section 3740, but are within the prohibition of these sections.

This construction makes these provisions forbid that any Member of, or Delegate to, Congress shall be a party to, or interested in, any contract with, or on behalf of, the United States, which is in its nature executory and continuous as to future performance, and perhaps this is just what was intended by these sections.

With the policy or expediency of forbidding a Member of Congress to be a party to, or interested in, a contract which Congress alone can authorize, or how far such prohibition should, or should not, extend, we have no concern. This is for Congress alone.

From the nature of the contract transmitted with your note it is manifest that in case a person with whom it is desired to make such contract is a Member of, or Delegate to, Congress, it would interfere with the carrying out of what is contemplated by the reclamation act referred to, if he could not enter into such contract, when willing to do so; and that it would be to the advantage of the Government to be permitted to make such Member the same [illegible] of contract that it makes with any other person in a such reclamation project. And it may well be that it is urged here, that Congress did not intend that these sections should operate to prohibit such contracts as this, that, had the attention of Congress been called to it, it would have modified these sections as to their application to the reclamation act.

But in dealing with a statute fairly plain [illegible] such considerations have no place; and in [illegible] legislative intent, even if it were susceptible of ascertainment, cuts little figure except as it is [illegible] lative enactments, and when so expressed [illegible] of what is said must be taken to [illegible] intent, wherever that intent is mater[illegible]

And it is familiar law that even in a clear *casus omissus* a matter omitted by inadvertence or by being overlooked or unforeseen, can not be supplied by construction.

After careful examination of the whole subject, I am of opinion that the contracts to which you refer are within the prohibition of sections 3739, 3740, 3741, and 3742, Revised Statutes, and your question is answered in the affirmative.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE INTERIOR.

PURE FOOD LAW—BRANDING OF PACKAGES OF DISTILLED SPIRITS.

It was not intended by the opinion of January 11, 1908 (*ante*, 476), to require the term "high wines" to be applied to a product now usually marked "whisky."

For the purposes of the revenue laws, the term "high wines" should be applied to that which is practically the first product of distillation in which substances congeneric with alcohol have not been transformed or their properties otherwise partially eliminated so as to convert them into any form of potable spirits, and should not be applied either to any product of distillation, or to spirits which have been reduced by dilution or otherwise partially transformed so as to convert them into a form of potable spirits, although yet in crude form.

When "high wines" have been diluted to potable proof before being withdrawn from receiving cisterns into casks, and then constitute a form of potable spirits, although crude, then, so far at least as the revenue laws are concerned, such product more nearly resembles the particular form of potable spirits whose name it will ultimately be than it does "high wines," and it should be branded with the name of the particular potable spirits for which it is intended.

The term "spirits, as the case may be," applies to those products of distillation in which, by reason of the original material used and the methods of distillation employed, certain characteristic congeneric products have been retained which differentiate them into certain forms of potable spirits, such as whisky, brandy, and rum.

The term "alcohol" should be applied to the distillate heretofore known as "pure, neutral, or cologne spirits."

The by-product in the distillation of "true alcohol," for the purposes of the revenue laws, may be branded as "commercial," "refuse," or "coarse" alcohol, or any other term which will indicate definitely that it is a product intended only for purposes entirely distinct from those of a food or drug.

Spirits which have been rectified should be branded so as to show distinctly that the appropriate name of the potable spirits is not applied to spirits from which the congeneric substances have been practically eliminated—which would leave an alcohol—but only to those products of distillation which, without being blended or compounded with other substances, have been so treated as to partially transform or otherwise partially eliminate the original congeneric spirits and bring them to the condition of a particular form of potable spirits.

The duty of rebranding packages of distilled spirits to conform to proposed regulations should not be imposed in all cases, but should be limited to instances where the parties intending to use the spirits in Federal commerce in such manner as to render them subject to the food and drugs act, request a change in the branding.

The owner of a cask of spirits may brand his end of the cask with any name he sees fit, subject only to the penalties of the food and drugs act if it should enter into Federal commerce when mislabeled or misbranded under that act.

DEPARTMENT OF JUSTICE,
March 25, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of the 19th ultimo in which you transmit a copy of proposed amendments to the regulations relating to marks and brands upon spirit packages, and request to be advised whether in the form submitted they correctly interpret my opinion of January 11 last (*ante*, 476) in reference to this subject.

I have carefully considered the proposed amendments to the regulations and am of the opinion that they do not correctly interpret my former opinion in all respects, and contain certain provisions which you would be unauthorized to approve. I am of the opinion that they are inaccurate in the following respects:

BRANDING DISTILLED SPIRITS WITHDRAWN FROM RECEIVING CISTERNS.

1. It was not intended by my former opinion to require the term "high wines" to be applied to a product now usually marked "whisky." My former opinion said that

the term "high wines" should, as heretofore, be applied to that which is practically the first product of distillation in which the substances congeneric with alcohol have not been transformed or their properties otherwise partially eliminated so as to convert them into any form of potable spirits. I think this term is not to be applied, for the purposes of the revenue laws, either to any subsequent product of distillation or to spirits which have been reduced by dilution or otherwise partially transformed so as to convert them into a form of potable spirits, although yet in a crude form.

"SPIRITS, AS THE CASE MAY BE."

2. I am of the opinion that the term applies to those products of distillation in which, by reason of the original material used and the methods of distillation employed, certain characteristic congeneric products have been retained which differentiate them into certain forms of potable spirits, such as whisky, brandy, and rum. While it is true that certain of these spirits are in some cases, when drawn from the receiving cisterns into the casks, not in the potable form in which they are ultimately to be placed upon the market, certain congeneric products of distillation not having been changed by aging or otherwise, yet I am of the opinion that, in the intent of the law, when the original "high wines" have been diluted to potable proof before being drawn from the receiving cisterns into the casks and then constitute a form of potable spirits, although crude, then, so far at least as the revenue laws are concerned, such product more nearly resembles the particular form of potable spirits whose name it will ultimately bear than it does "high wines," and I therefore hold that it should be branded with the name of the particular potable spirits for which it is intended more appropriately than as "high wines."

3. More difficulty arises in reference to the use of the term "alcohol," owing to the fact that there appears to be a product of distillation, which had not been called to my attention, which is now commercially known as "alcohol," but is entirely different in its uses and purposes

from those of true alcohol in that it is not used or intended for use either as a food or a drug but for a fuel and for other purposes in the arts. This is virtually, as I understand it, a mere by-product in the distillation of true alcohol and is that portion of the distillate retaining in concentrated form the various congeneric products which it is the object of the process of distillation to remove in order to obtain the pure alcohol or refined spirits. While this by-product of alcohol containing these congeneric products is clearly not alcohol within the meaning of the food and drugs act, yet its true branding is immaterial for the purposes of that act, as it is not used as a food or drug. Its existence is not apparently contemplated by the present law and the question of what brand is to be given it is not therefore free from doubt, but I am of the opinion that this product may be properly branded for the purposes of the revenue laws as "alcohol," with some descriptive or qualifying adjective such as "commercial," "refuse," or "coarse," or any other appropriate term which you may select, which shall indicate definitely that it is a product intended only for purposes entirely distinct from those of a food or drug. To this extent my former opinion is qualified. The single term "alcohol," as the proposed regulations provide, should be applied to the distillate heretofore known as "pure, neutral, or cologne spirits."

BRANDING SPIRITS AFTER RECTIFICATION.

I am of the opinion that the phraseology of clause 1 of the proposed amended regulations relating to the branding of spirits after rectification should be amended so as to show distinctly that the appropriate name of the particular potable spirit is not to be applied to spirits from which the congeneric substances have been practically eliminated—which would leave an alcohol—but only to those products of distillation which, without being blended or compounded with other substances, have been so treated as to partially transform or otherwise *partially* eliminate the original congeneric spirits and bring them to the condition of a particular form of potable spirits. The same

comment applies to clause 2, where the use of the words "otherwise eliminated" without the qualification "partially" would, in my opinion, lead to the same ambiguity; and to clause 3, where there is likewise a possible ambiguity owing to the fact that there is no comma between the words "eliminate" and "with."

WHOLESALE LIQUOR DEALERS' PACKAGES.

It should, in my opinion, be made plain in reference to wholesale liquor dealers' packages that the proposed regulations only apply where there has been no change in the original package.

REBRANDING.

In reference to the proposed regulation requiring the gaugers to rebrand all casks heretofore branded not in conformity with the proposed regulations, I am of the opinion that this duty should not be imposed in all cases but should be limited, at most, to any instances where the parties intending to use the spirits in Federal commerce in such manner as to render them subject to the food and drugs act, and desiring to conform thereto, request a change in the branding. This, however, is not strictly material, for, in my judgment, the branding which has been heretofore put upon these casks under the former practice of the Internal Revenue Department, without any reference to the question of the food and drugs act, is not relevant in the determination of the question of what are proper labels under that act, and, as there is no provision of law authorizing the gauger to rebrand a marked cask, I see no necessity for your directing this to be done; in fact, I am not prepared to advise you that you are authorized so to do.

I should add in this connection that, so far as I am now advised, I do not understand that the limitation of the brands to be placed by gaugers upon the Government end of the casks under your regulations will have any application to the names that may be put by the owners of spirits upon the other end of the cask to further indicate

the particular kind of spirit, as, for example, to show whether whisky is rye or "Bourbon," or brandy is peach or apple, although such additional naming would be subject to the various provisions of law as to shipment, misbranding, etc. In many cases taxable spirits will never enter into Federal commerce so as to be subject to the food and drugs act. And even so far as that act is concerned, the owner of a cask of spirits may, I think, brand his end of the cask with any name that he sees fit, subject only to the penalties of the food and drugs act if it should enter into Federal commerce when mislabeled or misbranded under that act.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

FOOD AND DRUGS ACT—LABELING OF CONDEMNED MEDICINAL SUPPLIES INTENDED FOR SALE.

A sale under section 1241, Revised Statutes, by Government officers, of drugs and medicines purchased for the use of the Army and afterwards condemned as being unfit for use, is as much subject to the provisions of the food and drugs act of June 30, 1906 (34 Stat., 768), as a sale by a private person would be under similar circumstances, and would render the officers making the sale liable under that act, unless the drugs and medicines so sold are labeled in accordance with its provisions.

Where a drug so sold is not sold under a name recognized in the United States Pharmacopœia, a general statement on the label that its quality has deteriorated and that it has been condemned for sale under section 1241, Revised Statutes, would be a sufficient compliance with the food and drugs act of 1906, and would show that it was not sold under any professed standard, and could not be deemed either adulterated or misbranded under sections 7 and 8 of that act.

Where a drug so sold is sold under a name recognized by the United States Pharmacopœia, a mere general statement of the character of the drug, showing only the fact of its deterioration is insufficient; and in order that it may not be deemed adulterated, its actual standard of strength, quality, or purity should be stated on the label of each bottle, box, or other container in which the goods are intended to reach the consumer.

A sale of such condemned drugs and medicines could in no respect affect the original makers or vendors from whom they were purchased before the passage of the food and drugs act of June 30, 1906, unaccompanied by any guarantee under that act, and at a time previous to their deterioration.

DEPARTMENT OF JUSTICE,
March 27, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of the 23d instant in which you state that certain drugs and medicines of the Medical Supply Depot, United States Army, New York City, which were purchased before the enactment of the food and drugs act of June 30, 1906, have been inspected and condemned as "deteriorated, not fit for issue" and as "fermented, unfit for issue," and that your Department, upon the recommendation of the inspector, has ordered the same to be sold under the authority of section 1241 of the Revised Statutes. You further state that the proposed sale would cover the goods in the original cases bearing the marks of the original makers of vendors; and that since on account of the deterioration of these supplies the state of purity of each article can not be known without an analysis, it would be impracticable to mark each case according to its actual contents.

You thereupon request an expression of my opinion upon the three following questions:

Whether the sale of these condemned drugs and medicines under section 1241, Revised Statutes, would be within the purview of the food and drugs act, as distinguished from a sale by a private vendor, so as to render the officers making the sale liable under the act;

Whether, if such sale comes within the terms of the act, it would be sufficient to label each original package as follows: "Deteriorated military supplies. Condemned and sold under section 1241, Revised Statutes; and

Whether, in any event, the sale of the articles would involve any liability on the part of the original makers or vendors of the condemned drugs or medicines.

In reply, I have the honor to state:

1. I am of the opinion that if the proposed sale otherwise presents a case of Federal commerce coming within

the provisions of the food and drugs act, and not merely a case of purchase and sale in State commerce to which the food and drugs act would have no application, the provisions of that act would apply even although the sale were made by officers of the Government under the provision of the Revised Statutes.

Revised Statutes, section 1241, provides that: "The President may cause to be sold any military stores which, upon proper inspection or survey, appear to be damaged, or unsuitable for the public service. Such inspection or survey shall be made by the officers designated by the Secretary of War, and the sales shall be made under regulations prescribed by him."

Section 2 of the food and drugs act (34 Stat., 768), provides that—

"any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded food or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court."

This act is broad in its terms, without any exception in favor of the Government or its officers, and includes generally "any person" who shall ship, deliver, sell, or offer to sell, adulterated or misbranded food or drugs in violation of its provisions.

While it is a well-settled principle of statutory construction that a general prohibition contained in a statute does not ordinarily extend to or affect the sovereign, yet, as stated in an opinion which I rendered the Secretary of the Treasury on January 2 last (*ante*, 466), citing the language of Mr. Justice Story in *United States* v. *Hoar* (2 Mason, 311, Fed. Cas. 15373), the Government is to be regarded as included within such prohibition when either the nature of the mischiefs to be redressed or the language used shows that this was in the contemplation of the legislature. This is generally the case where the statute "is made for the public good, as for the advancement of religion and justice, or to prevent injury and wrong." (*United States* v. *Knight*, 14 Pet., 301, 315; *United States* v. *Herron*, 20 Wall., 251, 255; 8 *Bacon's Abridgment by Bouvier*, 92, *Tit.* "*Prerogative*," E. 5.)

The mischiefs to be redressed by the food and drugs act are shown by its title, which reads: "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, medicines, and liquors, and for regulating traffic therein, and for other purposes." As I have heretofore said, its primary purpose "is to protect against fraud consumers of food or drugs" (26 Op., 219). Clearly, if adulterated or misbranded food or drugs were sold by the Government or its officers the purpose of the statute would be as much defeated and the injury to the consumer as great as if such articles were sold by private individuals. Furthermore, the theory that Congress intended that the Government itself might sell adulterated or misbranded drugs under circumstances when a sale by individuals was forbidden would involve an inconsistency which undoubtedly was not intended by the legislature. I, therefore, am clearly of the opinion that a sale by Government officers under Revised Statutes, section 1241, is as much subject to the provisions of the food and drugs act as a sale by a private person would be under similar circumstances.

2. Whether, if these drugs and medicines are sold and delivered under circumstances otherwise coming within the

food and drugs act, it would be a sufficient compliance with that act to label each original package with a statement that it contains deteriorated military supplies, condemned and sold under section 1241 of the Revised Statutes, would depend upon the precise facts.

The following provisions of the food and drugs act are applicable to the case of deteriorated drugs:

Section 7 provides that drugs shall be deemed to be adulterated in the following cases:

"First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

"Second. If its strength or purity fall below the professed standard or quality under which it is sold."

Section 8 provides that drugs shall be deemed to be misbranded "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular."

It does not appear from your letter what portion, if any, of these drugs are sold under names recognized in the United States Pharmacopœia, or whether the "original packages" to which you refer are the bottles, boxes, or other containers of the drugs in the form in which they are prepared for sale to the consumer, or are larger packages containing several of such bottles or boxes.

I am of the opinion that where a drug is not sold under a name recognized in the United States Pharmacopœia a general statement on the label such as that suggested, showing that its quality has deteriorated and that it has

been condemned for sale, would be a sufficient compliance with the law, as this would on its face correct any statement on the original label which might otherwise be misleading as to the quality, and would show that it was not sold under any professed standard, so that it could not then be deemed either adulterated under the second clause of section 7 or misbranded under section 8.

However, in case of a drug sold under a name recognized by the United States Pharmacopœia, I am of the opinion that a mere general statement of this character, showing only the fact of its deterioration, is insufficient, and that, in order that a drug sold under such name may not be deemed adulterated, it is necessary under the proviso contained in the first clause of section 7 that the actual standard of strength, quality, or purity should be stated.

I am further of the opinion, without passing upon the question as to what constitutes an original package within the meaning of section 2 of the act, that, so far as correcting any statement on the original label is concerned, it would not be sufficient to make such correction merely upon the label on the outer envelope of a package holding several bottles, boxes, or other containers of the drugs, but that the correction must be made upon the label of each bottle, box, or other container in which the goods are intended to reach the consumer, since evidently a statement of the true standard upon the covering of a package containing several bottles or boxes would be entirely valueless as a protection to the purchaser, and, being thrown away before the drug reached the consumer, would enable each bottle or box to be sold without any notice of its inferiority.

3. I am further of the opinion that the proposed sale could, however, in no respect affect the original makers or vendors from whom these supplies were purchased before the passage of the food and drugs act, unaccompanied by any guaranty under that act, and at a time previous to their deterioration.

Respectfully,

CHARLES J. BONAPARTE.

The Secretary of War.

OFFICIAL REGISTER OF UNITED STATES—COST OF PRINTING.

The Official Register of the United States, being a public document emanating from the Census Office, all expense incurred in its actual preparation for printing, apart from the creation of the manuscript, is chargeable under the joint resolution of March 30, 1906 (34 Stat., 825), to the appropriation or allotment of appropriation for printing and binding for the Census Office; and the balance of the cost thereof, which include the cost of binding and any charge which may be incurred in the creation of the manuscript, should be charged to the Congressional allotment and the appropriate executive allotment in proportion to the number of copies delivered to Congress and to each Department.

DEPARTMENT OF JUSTICE,
March 28, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of March 23, stating that the Public Printer has charged against the allotment for printing and binding for the State Department the cost of the quota of 100 copies of the Official Register of the United States allotted to the State Department in the distribution of that work under section 73 of the printing act of January 12, 1895 (28 Stat., 601, 612–619). You hold that this is not a legitimate charge against the State Department, and that if the Department is to be charged with the expense of all documents provided by law and distributed to the Department, the control of the allotment is practically withdrawn from the Department, and that it will be impossible to comply with the proviso in the resolution of March 30, 1906; and you request my opinion upon the legality of the charge in question.

The act of June 7, 1906 (34 Stat., 218), transfers from the Secretary of the Interior to the Director of the Census the editing and publishing of the Official Register of the United States under the provisions of existing law, which are (section 73, act of 1895, *ut supra*) that certain public and official data shall be furnished, that the Register shall be edited, indexed, and published, and 3,000 copies printed and bound and distributed in a certain way, including 100 copies to the Department of State. No charge has been

made against the State Department for this item in previous years.

The joint resolution of March 30, 1906 (34 Stat., 825), provided that hereafter the cost of printing and binding of "documents" "emanating from the executive departments, bureaus and independent offices of the Government" should be charged not to the allotment for printing and binding for Congress, or to other than executive appropriations as theretofore, but "shall be charged to the appropriation or allotment of appropriation for the printing and binding of the Department, bureau, or independent office of the Government in which such document or report originates." This change of rule affected the cost of illustrations, composition, stereotyping, and other work involved in the actual preparation for printing, apart from the creation of manuscript, the balance of cost being chargeable to the Congressional allotment or the appropriate executive allotment in proportion to the number delivered to each: and, finally, the cost of copies delivered otherwise than through Congress or the Departments being chargeable as theretofore.

The proviso of the resolution is that each Executive Department, bureau, or independent office for which a printing appropriation is made shall, before December 1 of each year, obtain from the Public Printer an estimate of cost of the publications of such Department or office required by law, and so much of the same as would under the terms of the resolution be charged to the appropriation of the Department, etc., in which such publications originate shall be set aside and be available only for the printing and binding of such documents until all of the allotment cost on that account shall have been paid.

In my opinion, since the Official Register is a public document emanating from the Census Office under the direction of the statutes, the printing cost as defined in the resolution of 1906 seems clearly chargeable to the Census Office appropriation in accordance with the language "shall be charged to the appropriation or allotment of appropria-

tion for the printing and binding of the Department, bureau, or independent office of the Government in which such documents or reports *originate;*" and that the balance of the cost shall be charged to the Congressional allotment and the appropriate executive allotment in proportion to the number delivered to each. As the distribution provided for in section 73 of the act of 1895 embraces allotments to Congress and the members thereof, to the Departments and to various offices and branches of the Government, as well as other depositories, there appears to be no reason why a proportional charge of such balance of cost should not be charged in accordance with the statute, in this case to the State Department appropriation, in proportion to the number delivered.

The scheme appears to be, in brief, that the printing cost shall be charged to the particular Department or bureau or office in which the publication originates, and the balance proportionately to Congress and the Departments and offices of the Government to which the distribution is made.

Without attempting to determine a point that previous laws and established practice may definitely settle, it appears to me that since the resolution at its outset refers to printing and binding and, on the other hand, the apportionment of cost embraces, first, what I have called the printing cost, being for the "work involved in the actual preparation for printing, apart from the creation of manuscript," and, second, "the balance of cost," the latter division, which is to be apportioned between Congress and the Departments, must necessarily include the binding cost and any charge which may be incurred for the creation of manuscript. Suggesting this view, however, rather than deciding that point, I have the honor to advise you that, except as herein indicated to be apportioned, the charge of the Public Printer against the State Department for the copies of the Official Register is not legal.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF STATE.

POSTMASTER-GENERAL—EXCLUSION OF SEDITIOUS PUBLICATIONS FROM THE MAILS.

While the question is not free from doubt, the Postmaster-General will be justified in excluding from the mails any issue of a periodical, otherwise entitled to the privilege of second-class mail matter, which shall contain any article constituting a seditious libel and counseling such crimes as murder, arson, riot, and treason.

The printing and circulation of such a paper was clearly an offense at common law, but it constitutes no offense against the United States in the absence of a Federal statute making it one.

The publication in question is not "indecent" in the sense in which that word is used in section 3893, Revised Statutes, as amended by the acts of July 12, 1876 (19 Stat., 90), and September 26, 1888 (25 Stat., 496), nor is it an "article or thing intended * * * for * * * immoral use," in the sense of the particular immoral purposes which Congress intended should render such matter unmailable under the provisions of that law.

The publication would come within the terms of the act of June 18, 1888 (25 Stat., 187), as amended by the act of September 26, 1888 (25 Stat., 496), as being "libelous," "scurrilous," "defamatory," and "threatening," if such matter were printed on its cover or wrapper.

There is no statute directing the exclusion from the mails of a publication counseling such crimes as murder, arson, riot, and treason, and making its deposit in the mails an offense against the United States; and in the absence of such a statute, it is not an offense to print and deposit in the mails a publication of such a character.

Congress has full power under the Constitution to exclude from the mails a publication which counsels the commission of murder, arson, riot, or treason, and to make the use, or the attempted use, of the mails for the transmission of such writings a crime against the United States.

DEPARTMENT OF JUSTICE,
March 31, 1908.

SIR: On March 20, 1908, I received from you the following letter:

"To the DEPARTMENT OF JUSTICE:

"By my direction the Postmaster-General is to exclude La Questione Sociale, of Patterson, N. J., from the mails, and it will not be admitted to the mails unless by order of the court, or unless you advise me that it must be

admitted. Please see if it is not possible to prosecute criminally under any section of the law that is available the men that are interested in sending out this anarchistic and murderous publication. They are of course the enemies of mankind and every effort should be strained to hold them accountable for an offense far more infamous than that of an ordinary murderer.

"This matter has been brought to my attention by the mayor of the city of Paterson. I wish every effort made to get at the criminals under the Federal law. It may be found impossible to do this. I shall also, through the Secretary of State, call the attention of the governor of New Jersey to the circumstances, so that he may proceed under the State law, his attention being further drawn to the fact that the newspaper is circulated in other States. After you have concluded your investigation I wish a report from you to serve as a basis for a recommendation by me for action by Congress. Under section 3893 of the Revised Statutes lewd, obscene, and lascivious books and letters, publications for indecent and immoral uses or of an indecent and immoral nature, and postal cards upon which indecent and scurrilous epithets are written or printed, are all excluded from the mail, and provision is made for the fine and imprisonment of those guilty. The newspaper article in question advocates murder by dynamite. It specifically advocates the murder of enlisted men of the United States Army and officers of the police force, and the burning of houses of private citizens. The preaching of murder and arson is certainly as immoral as the circulation of obscene and lascivious literature, and if the practice is not already forbidden by the law it should be forbidden. The immigration law now prohibits the entry into the United States of any person who entertains or advocates the views expressed in this newspaper article. It is of course inexcusable to permit those already here to promulgate such views. Those who write, publish, and circulate those articles stand on a level with those who use the mails for distributing poisons for the purpose of murder; and convictions have been obtained when the mails have thus been used for the distribution of poisons. No

law should require the Postmaster-General to become an accessory to murder by circulating literature of this kind."

There was also a letter to you of March 19, 1908, from Hon. Andrew S. McBride, mayor of the city of Paterson, in the State of New Jersey, and certain newspaper clippings, two of which contain what purport to be translations of an alleged article in the publication "La Questione Sociale" mentioned in your letter, and which I understand to be printed and circulated in Italian. The article thus attributed to La Questione Sociale, as translated in the clippings, reads as follows:

"We want everybody to be with us. We invite everybody to get together and arm themselves. Seventy-five per cent have only a knife in the house which will only cut onions.

"It will be a good thing for everybody to have a gun. When we are ready the first thing to do is to break into the armory and seize the rifles and ammunition. Then all the people will be with us as soon as they see this. The next thing to do is to get hold of the police station, and when the police see that they are not strong enough the chief of police will ask for soldiers.

"Even at that the dynamite is easy to get for us. Twenty-five cents worth will blow a big iron door down. We don't want to forget that the dynamite will help us to win. Two or three of us can defy a regiment of soldiers without fear. We will start when no one is thinking anything about it. Then we can beat them man for man. At that time show no sympathy for any soldiers, even if they be sons of the people. As soon as we get hold of the police station it is our victory. The thing is to kill the entire force. If not they will kill us. After we have done this the first thing to do is to look out for ourselves first and then for the people who helped us.

"We must get into the armory; and in case we can not, then we will blow it down with dynamite. Then when we are ready we must set fire to three or four houses in different locations on the outskirts which will bring out the fire department and all the police. Then we will start a fire

in the center of the city. This will be an easy thing to do as the police and firemen will be on the outskirts."

I have carefully examined the law relating to the subject-matter of your letter of March 20, and in accordance with your direction submit the following report thereon. I must premise, however, by saying I have not sought information as to the accuracy of the translation of the article, nor yet as to the character of the publication itself, and the antecedents or purposes of its publishers, except in so far as these are indicated by the alleged passage in the same article hereinbefore set forth. If this publication does not come within the class of periodicals entitled to transportation in the mails as mailable matter of the second class, for reasons other than the sentiments it expresses, or the illegal or immoral character of its contents, the Post-Office Department has ample authority to deny it admission to the mails, and, I am informed, that in fact this has been done for reasons altogether independent of the peculiar characteristics of the alleged article called to your attention. Moreover, while it would be appropriate, of course, to ascertain all the material facts respecting the periodical concerned, or the individuals responsible for its publication before instituting proceedings of any kind which might affect their rights or interests, I understand your instructions as directing a report upon the assumption that the alleged newspaper in question, and others of a similar character, habitually publish articles substantially similar to the one translated in the clipping sent me. Your letter asks in substance:

First. Whether the publication of such articles constitutes a criminal offense on the part of the publishers.

Second. Whether this offense is punishable by the Federal courts.

Third. Whether such publications are criminal or excluded from the mails by any existing statute of the United States.

Fourth. Whether, if they are not, the Congress can constitutionally enact a law or laws providing for their exclusion and their treatment as crimes.

Fifth. Whether, in the existing condition of the law, the Postmaster-General can be compelled to admit such pub-

lications to the mails and transport and distribute them as mail matter.

1. The article in question, supposing it to have been accurately translated, constitutes a seditious libel, and its publication, in my opinion, is undoubtedly a crime at common law. (See Russell on Crimes, 6th ed., vol. 1, sec. 1, chap. 28, p. 595.)

In *Reg.* v. *Lovett* (9 C. & P., 466), Littledale, J., says:

"If this paper has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, * * * it is a seditious libel."

Referring to the above-mentioned offense, Professor Greenleaf says:

"This crime is committed by the publication of writings blaspheming the Supreme Being; or turning the doctrines of the Christian religion into contempt and ridicule; or tending, by their immodesty, to corrupt the mind, and to destroy the love of decency, morality, and good order; or wantonly to defame or indecorously to calumniate the economy, order, and constitution of things which make up the general system of law and government of the country; to degrade the administration of government or of justice; or to cause animosities between our own and any other foreign government, by personal abuse of its sovereign, its ambassadors, or other public ministers; and by malicious defamations, expressed in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead or the reputation of one who is living, and thereby to expose him to public hatred, contempt, and ridicule. This descriptive catalogue embraces all the several species of this offense which are indictable at common law; all of which, it is believed, are indictable in the United States, either at common law or by virtue of particular statutes." (3 Greenl. Ev., sec. 164.)

In Starkie on Libel, first edition, page 525, the test of the criminality of such a publication is said to lie in the answer to the following question: "Has the communication a plain tendency to produce public mischief by perverting the mind of the subject and creating a general dissatisfaction toward government?" In the publication you have

called to my attention, all persons reading it are urged to procure arms, to seize, or if that be impossible, to destroy by dynamite, certain public buildings; to resist forcibly, and, if practicable, kill police officers endeavoring to discharge their duties as such, and also the military forces which might be sent to aid in the restoration of order. It is immaterial whether the writer referred to the Regular Army of the United States or to the organized militia of the State of New Jersey in this connection, and the criminal character of his utterance is not affected by the fact that he failed to designate any particular policeman, or any individual officer or enlisted man of the Army or militia among his intended victims.

"A person delivered a ticket up to the minister after sermon, wherein he desired him to take notice that offenses passed now without control from the civil magistrate, and to quicken the civil magistrate to do his duty, etc.; and this was held to be a libel, though no magistrate in particular was mentioned. Bac. Abr. tit. Libel (A) 2." (Russell on Crimes, vol. 1, p. 623.)

In this instance the publication not only suggests, but urges, arson, murder, riot, and treason against both the State and the National governments. There can be hardly a clearer or stronger case of a seditious libel at common law.

2. It is quite clear, however, that such a publication constitutes no offense against the United States in the absence of some Federal statute making it one. This was determined in the early case of *United States* v. *Hudson and Goodwin* (7 Cr., 32), decided February 13, 1812. The report says:

"This was a case certified from the Circuit Court for the District of Connecticut, in which, upon argument of a general demurrer to an indictment for a libel on the President and Congress of the United States, contained in the Connecticut Currant, of the 7th of May, 1806, charging them with having in secret voted two millions of dollars as a present to Bonaparte for leave to make a treaty with Spain, the judges of that court were divided in opinion upon the question whether the Circuit Court

of the United States had a common-law jurisdiction in cases of libel."

The court determined in this case that the courts of the United States have no common-law jurisdiction in criminal cases, pointing out that no provision of the Constitution or statutes enacted under its powers had conferred such jurisdiction, and decided that it could not be implied from the mere necessity of protecting the Federal Government in the execution of its constitutional duties. The court says in conclusion:

"Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the State is not among these powers. To fine for contempt—imprison for contumacy—enforce the observance of order, etc., are powers which can not be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common-law cases we are of opinion is not within their implied powers."

From the foregoing considerations I conclude:

1. That the printing and circulation of the paper in question, supposing it to be correctly translated, was clearly an offense at common law.

2. That of this offense the courts of the United States have no jurisdiction in the absence of any act of Congress declaring it a crime and authorizing its punishment.

3. In compliance with your instructions I have very carefully investigated the statutes of the United States to see if they contain any provision making such a publication an offense against the United States or authorizing its exclusion from the mails. Section 3893, Revised Statutes, as amended by the acts approved July 12, 1876 (19 Stat., 90), and September 26, 1888 (25 Stat., 496), contains the following provision:

"Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing de-

signed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, whether sealed as first class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, any any person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of, or of aiding in the circulation of or disposition of the same, shall, for each and every offense, be fined upon conviction thereof not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court."

There can be, I think, no doubt that, in a sense, this article is a "publication of an indecent character;" but it is not, in my opinion, "indecent" in the sense in which the word is used in this section. It is also clearly an "article or thing intended * * * for * * * immoral use," for its purpose is plainly to suggest several grave crimes, including treason, murder, and arson, and such a purpose is undoubtedly immoral; but the particular immoral purposes which the Congress intended to render matter unmailable under this provision of law are not such purposes as inspired the article in question. The language of the section shows clearly that it was intended to exclude matter either literally "obscene" in the sense generally attributed to the word, or of a nature "*ejusdem generis* with obscenity. In this case the rule *noscitur a sociis* must be applied to such words as "indecent" and "immoral" in the construction of a highly penal statute, and I can not advise you that the section above quoted authorizes either the prosecution of the persons mailing the paper in question or its exclusion from the mails.

The act of June 18, 1888 (25 Stat., 187), as amended by the act of September 26 of the same year (ibid., 496) is as follows:

"That all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another may be written or printed, or otherwise impressed or apparent, are hereby declared non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same or cause the same to be taken from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, upon conviction thereof, be fined not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court."

I have no doubt that the publication in question would come within the terms of this statute, if the article to which you have called my attention were printed on its cover or wrapper or it were so folded that this part of its contents might be exposed to public view. Its language is undoubtedly "libelous," "scurrilous," "defamatory," and "threatening," and if deposited in the mail in such manner that, without removing the cover, this language might be read by other persons than the one to whom it was addressed, it would unquestionably come within the prohibition of the act. I infer, however, since there is no statement as to the nature of its inclosure, that this paper was so wrapped and folded as not to disclose the article in question, or, at all events, that you wish my opinion as to its criminal character and the propriety of its exclusion

from the mails independently of the question of its inclosure and in case its publishers should provide a wrapper which would conceal its contents; and, if thus inclosed, it would seem clearly not to come within the provisions of this statute.

There are some other provisions of law such as those relating to letters, circulars, etc., connected with lotteries or spurious money and those prohibiting the transportation of noxious insects in the mails which declare certain classes of matter unmailable, but they do not affect the case of an article of this character, and I am obliged to report that I can find no express provision of law directing the exclusion of such matter from the mails, or rendering its deposit in the mails an offense against the United States.

4. There can be no doubt, however, that the Congress has full power under the Constitution to exclude such publications from the mails. As is said by Mr. Justice Field in *Ex parte Jackson* (96 U. S., 727, 732):

"The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded."

In the case of *In re Rapier* (143 U. S., 110), the present Chief Justice says (p. 134):

"It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality."

Many other authorities might be cited to the same effect. It has been, it is true, sometimes contended that the right to use the mails constitutes a form of property which is protected from "confiscation" under the fifth amendment, or that such use can not be denied to any citizen without an infringement of the rights secured by the first amendment; but these contentions have been repudiated by high authority and seem to be clearly untenable in view of the decisions of the Supreme Court cited above.

I have the honor therefore to advise you that it is clearly and fully within the power of the Congress to exclude from

the mails the publications similar to the one set forth in the clippings inclosed with your letter, and to make the use, or attempted use, of the mails for the transmission of such writings a crime against the United States.

5. There remains to be considered the interesting and important question whether, in the absence of any legislation by Congress either directing or prohibiting the transmission of such publications through the mails, the Postmaster-General, in the exercise of his authority as head of the Post-Office Department and acting under your instructions, has the right to exclude them, and this question is one of no little difficulty. It must be premised that the Postmaster-General clearly has no power to close the mails to any class of persons, however reprehensible may be their practices or however detestable their reputation; if the question were whether the mails could be closed to all issues of a newspaper, otherwise entitled to admission, by reason of an article of this character in any particular issue, there could be no doubt that the question must be answered in the negative. Since, however, under the provisions of section 3882, Revised Statutes, and section 12 of the act approved March 3, 1879 (20 Stat., 359), newspapers may be fully examined either at the office of mailing or at the office of delivering, if such examination shall incidentally disclose the fact that a newspaper contains matter similar to the clippings sent with your letter, then, inasmuch as "all printed copies struck off from one common impression, though they constitute merely secondary evidence of the contents of the paper from which they are taken, are considered as primary evidence of each other's contents" (Taylor on Evidence, section 388; *Rex* v. *Watson*, 32 How. St. Tr., 82), this fact may be reasonably held to prove that the entire issue of the paper contains the same matter. Under such circumstances can the Postmaster-General exclude such issues from the mails?

At first sight it may seem that his right to do this is denied by the decision in *Teal* v. *Felton* (12 How., 284). In that case the postmaster at Syracuse, N. Y., refused to deliver to the plaintiff a newspaper sent him by mail because there was a mark on the wrapper in addition to the

address, and the Postmaster-General by circular had directed that newspapers having marks on their wrappers should not be delivered, except upon the payment of full letter postage. The plaintiff brought a suit in trover for the value of the newspaper, and obtained a verdict and judgment for 6 cents. The case finally reached the Supreme Court, and it was determined by that tribunal, first, that the law did not justify the instructions of the Postmaster-General, and, secondly, that the person to whom a newspaper is addressed, being its owner, can sue the postmaster for its value, if he refuses to deliver it when this is duly demanded at the office of delivery.

The court says (p. 292):

"The United States undertakes, at fixed rates of postage, to convey letters and newspapers for those to whom they are directed, and the postage may be prepaid by the sender, or be paid when either reach their destination, by the person to whom they are addressed. When tendered by the latter or by his agent, he has the right to the immediate possession of them, though he has not had before the actual possession. If then they be wrongfully withheld for a charge of unlawful postage, it is a conversion for which suit may be brought."

And so in the case of *Commerford* v. *Thompson* (1 Fed., 417), in the United States Circuit Court for the District of Kentucky, the court, Brown J., says (p. 419):

"While there is, undoubtedly, power to prescribe what shall or what shall not be carried by post (*Ex parte Jackson*, 96 U. S., 727–732), the mails are, *prima facie*, intended for the service of every person desiring to use them; and a monopoly of this species of commerce is secured to the Post-Office Department. (Rev. Stat., sec. 3982.) It is, then scarcely necessary to say that the officers of the Department are the agents of the public in the performance of this service, and that no postmaster, whether acting under the instructions of the Postmaster-General or not, can lawfully refuse to deliver letters addressed to his office, unless special authority for so doing is found in some act of Congress."

These authorities and some other decisions and dicta which might be cited to the same effect are entitled to

great respect, but, after a very careful consideration of the subject, I do not think they are decisive of the question here involved. That question may be thus stated: Is it the intention of the Congress, as expressed in the Federal statutes on this subject, that the mails should be used to convey libelous solicitations for the perpetration of treason and felonies, with knowledge on the part of the Postmaster-General and his subordinates that they are used for this purpose?

In the argument of Mr. James C. Carter for the petitioner in the case of *In re Rapier*, he supposes this question to be asked (143 U. S., p. 117):

"Is it true, then, that the Government of the United States is placed in the singular attitude that it can not discharge its duty of maintaining a mail service without extending the facilities which that service affords to criminals of every description to aid them in the commission of crime?"

The question is no less material to the construction of the postal laws than to their constitutionality. The Congress undoubtedly has power to say what shall and what shall not be mailable; but in the absence of compelling language, surely a construction of the statutes should not be adopted which would render officers of the Government accessories to grave crimes and convert the post-office into an agency destructive of the ends of the Government. In several statutes relating to the postal service there has been an implied recognition that matter offered for delivery might be excluded from the mail, although no statute was in existence prohibiting its transportation. Thus, section 3890, Revised Statutes, provides for the punishment of "any postmaster who shall *unlawfully* detain in his office any letter or other mail matter the posting of which is not prohibited by law," and in Revised Statutes, section 5471, provision is made for the punishment of "any person employed in any department of the postal service who shall *improperly* detain, delay, * * * any * * * newspaper." It is obvious that these words "unlawfully" and "improperly" are mere surplusage unless the detention might under certain circumstances be *lawful* and *proper*, notwithstand-

ing that the posting of the mail matter might *not* be "prohibited by law." So in section 15 of the act approved March 3, 1879 (20 Stat., 359), it is said: "Nothing in this act shall be so construed as to allow the transmission through the mails of any publication which violates any copyright granted by the United States." There is, in point of fact, no statute *expressly* prohibiting the transportation through the mails of publications violating the copyright law. The proviso just quoted *assumes* that *because* such publications are unlawful, they will or may be excluded from the mails, and guards against any construction of the statute in which it is contained which might relieve them from this *implied* prohibition.

In the consideration of this question it is important to bear in mind the relations of the United States to persons using the post-office. As is said in *Teal* v. *Felton*, above cited: "The United States undertakes to convey letters and newspapers for those to whom they are directed;" that is to say, it undertakes the business of a messenger. In so far as it conveys sealed documents, its agents not only are not bound to know, but are expressly forbidden to ascertain, what the purport of such messages may be; therefore, neither the Government nor its officers can be held either legally or morally responsible for the nature of the letters to which they thus, in intentional ignorance, afford transportation. But in the case of printed matter, intended for general circulation and which, by virtue of the statutes above mentioned, and in consideration of the reduced rate at which it is transported, the officers of the Post-Office Department have the legal right to thoroughly inspect, it seems obvious that neither these officers nor the Government which employs them can escape responsibility for the consequences if they knowingly transport matter which becomes, and which they must know might be reasonably expected to become, a cause of crime.

It is said by Mr. Justice Field in *Ex parte Jackson* (*supra*), referring to the postal laws (96 U. S., 732):

"In their enforcement, a distinction is to be made between different kinds of mail matter, between what is intended to be kept free from inspection, such as letters,

and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined."

It seems clearly unreasonable to construe these laws without regard to this distinction, and no less unreasonable to give them a construction which would make the Postmaster-General and his subordinates conscious, even if unvoluntary, agents in the solicitation of treason and felonies and the circulation of seditious libels.

There is another aspect to this question. To determine whether those responsible for such publications have a legal right to their transportation in the mails it may be material to determine whether they would have any adequate remedy if refused such transportation. In the case of *Commerford* v. *Thompson*, above cited, while the court held that there was no right to exclude from the mails the matter excluded in that case, it also held that the remedy by injunction was not open to the plaintiff. The language of the court is as follows (1 Fed., p. 422):

"Conceding that the act of the defendant in detaining these letters was unauthorized, and that the complainant might maintain an action at law for damages, it does not necessarily follow that he is entitled to an injunction. The writ of injunction does not issue as a matter of course, even if the complainant has made out a technical right to relief. An application to the Court of Chancery for the exercise of its prohibiting powers or restricting energies must come by the dictates of conscience, and be sanctioned by the clearest principles of justice. The granting of an application is largely a matter of discretion, and is addressed to the conscience of the chancellor, acting in view of all the circumstances connected with the case. A party seeking this extraordinary remedy must come into court with clean hands, and show not only that his claim is valid by the strict letter of the law, but that in justice and equity he is entitled to this particular mode of relief."

After citing many authorities to sustain this position and examining the facts of the case, in so far as they were

disclosed by the record, the court concluded (1 Fed., p. 425):

"In any light in which this case can be viewed, it is impossible to avoid the conclusion that the court is required to lend its aid to a scheme condemned alike by Congress and by public opinion. Complainant should be left to his remedy at law."

How the Congress views the "schemes" disclosed in the article from La Questione Sociale sufficiently appears from the following provision in the act approved February 20, 1907 (34 Stat., 908):

"No person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, shall be permitted to enter the United States or any territory or place subject to the jurisdiction thereof."

It is a matter of notoriety, and therefore of judicial knowledge, that this measure was enacted in obedience to imperative demand of public opinion. I can not doubt therefore that any court of conscience would reach the conclusion with that announced in *Commerford* v. *Thompson* if asked to compel the dissemination throughout the country of the publication inclosed with your letter. Such a court would unquestionably leave the complainant to his remedy at law. What would be the value of that remedy?

It is well settled that at common law the owner of a libelous picture or placard or document of any kind is entitled to no damages for its destruction in so far at least as its value may depend on its unlawful significance. Thus in the case of *Du Bost* v. *Beresford* (2 Camp., 511) a suit was brought for cutting a picture of great value which the plaintiff had publicly exhibited, and it is stated—

"It appeared that the plaintiff is an artist of considerable eminence, but that the picture in question, entitled

La Belle et la Bete, or 'Beauty and the Beast," was a scandalous libel upon a gentleman of fashion and his lady, who was the sister of the defendant. It was exhibited in a house in Pall-Mall for money, and great crowds went daily to see it, till the defendant one morning cut it in pieces. Some of the witnesses estimated it at several hundred pounds.

"The plaintiff's counsel insisted, on the one hand, that he was entitled to the full value of the picture, together with a compensation for the loss of the exhibition; while it was contended on the other that the exhibition was a public nuisance, which every one had a right to abate by destroying the picture.

"Lord Ellenborough: 'The only plea upon the record being the general issue of *not guilty*, it is unnecessary to consider whether the destruction of this picture might or might not have been justified. The material question is as to the value to be set upon the article destroyed. If it was a libel upon the persons introduced into it, the law can not consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damage, must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts.'"

But for the error in the defendant's pleading, there would have been no right of recovery at all in this case; for in *Fores* v. *Johnes* (4 Esp., 97), in which the plaintiff was a print seller in Piccadilly, and the action was brought to recover the value of a quantity of caricature prints sold by him to the defendant, Lawrence, J., said:

"For prints, whose objects are generally satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I can not permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals, and for which the plaintiff might have been rendered criminally answerable for a libel."

It may be safely said that *ex turpi causa non oritur actio* is a well-recognized principle of law: a stronger case could hardly be presented for its application than a claim for damages by a would-be murderer, incendiary, and promoter of rebellion against a public officer because the latter refused to become a party to his crimes, or to use a great public service, supported in large part by the taxes and regulated by the laws of the nation, to aid in the subversion of orderly government and civil society.

While, therefore, in the absence of any express provision of law or binding adjudication on this precise point, the question is certainly one of doubt and difficulty, I advise you that, in my opinion, the Postmaster-General will be justified in excluding from the mails any issue of any periodical, otherwise entitled to the privileges of second-class mail matter, which shall contain any article constituting a seditious libel and counseling such crimes as murder, arson, riot, and treason.

I am, sir, yours, very respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

NATIONAL MUSEUM BUILDING—DELIVERY OF GRANITE FOR.

The contract made with the Thompson-Starrett Company for furnishing the granite for the south pavilion and dome of the new National Museum building requires its delivery by the company on the cars at the Bethel, Vt., quarry within two years from the date originally fixed for the completion of the contract—that is, on or before April 17, 1908, and payment therefor may be made as heretofore, in monthly installments, at the stipulated price.

The contract does not, however, authorize the superintendent of construction to withhold payments on account of the delay in supplying such granite, but in the event of an extension of time being allowed to complete the contract, may deduct "all expenses for inspection and superintendence and all actual losses and damages to the United States due to the delay beyond the time originally set for its completion," as provided in paragraph 5 of the contract.

DEPARTMENT OF JUSTICE,
April 9, 1908.

SIR: Your letter of March 27 transmits for my consideration and opinion, upon the questions therein presented, a letter from the Secretary of the Smithsonian Institution, with its accompanying papers, relating to a contract for certain granite to be used in the construction of the new building for the National Museum.

It appears that on October 17, 1904, the superintendent of construction for said building entered into a contract with the Thompson-Starrett Company, of New York, for furnishing and delivering at the site of the building for the National Museum, from quarries at Bethel, Vt., cut granite for the front walls of the first and second stories, for the sum of $362,448.63. The contract further provides that "within two years from the date of the completion of this contract," if required by the United States, the Thompson-Starrett Company shall "furnish for the said building, 'free on board' cars at the said quarries, all of the granite * * * required for the construction of the central pavilion and dome at the south front of the building * * * for the price of $0.82½ per cubic foot." Owing to lack of diligence and delay in furnishing the granite last mentioned, which, it is stated, is greatly embarrassing the progress of the work on the National Museum building, the superintendent of construction, under the authority, as claimed, of certain provisions of the contract has recently withheld payments from the contractor, and in consequence of this action a difference of opinion has arisen between the parties as to the time within which the delivery of the granite may be completed under the contract, and as to the appropriate dates of payment for granite delivered. Based on these facts, two questions are propounded for my opinion, namely:

1. Within what time does the contract require the delivery on cars at the Bethel quarry of all of the granite stock for the south pavilion and dome of the new National Museum building?

2. When, or within what discretion, if any, should payments therefor be made?

The stipulation in the articles of agreement to furnish granite for the south pavilion and dome of the National Museum building is made in pursuance of the provisions of paragraph 27 of the specifications, which reads in part as follows:

"27. As the granite for the pavilion and dome at the south front of the building is not included in the proposal and contract herein provided for, and as it will have to be procured later to match the granite adopted for the first and second stories, the contractor for the last-mentioned granite must agree to furnish to the United States 'F. O. B.' at the quarry at any time within two years after the expiration of his contract, all the granite needed from said quarry for the construction of the said pavilion and dome." * * *

By paragraph 43 of the specifications the time for the expiration or completion of the contract covering the cut granite is fixed at one and a half years from the date of the contract (October 17, 1904), namely, April 17, 1906; so that the rough granite for the pavilion and dome was deliverable not later than April 17, 1908. It seems, however, that owing to delays on the part of the contractor the work of delivering the cut granite for the first and second stories of the building was not completed by the date fixed.

The articles of agreement (paragraph 5) provide that in case the said contractor shall fail to prosecute the work covered by his contract so as to complete the same within the time agreed upon, the superintendent of construction may waive the time limit and permit the finishing of the work within a reasonable period, to be determined by him, with the proviso that "such waiver of the time * * * shall in no other manner affect the rights or obligations of the parties." If the original time limit is waived, all actual losses and damages resulting to the United States on account of the delay beyond the time originally set for completion are to be determined by the superintendent of construction and deducted from the payments to the con-

tractor. Acting under this authority, the superintendent of construction granted an extension of time to the contractor, permitting delivery of the cut granite as late as June 30, 1907. As a matter of fact, however, that portion of the work was not finished until October 17, 1907, or just one year and a half after the time fixed by the contract.

It is contended by the contractor that the terms of the contract permit him to supply the rough granite for the pavilion and dome within two years from the date of the *actual completed delivery* of the cut granite for the first and second stories of the building on October 17, 1907; that is, that the rough granite is deliverable on or before October 17, 1909. On the other hand, the superintendent of construction contends that delivery of the rough granite is due within two years from the original date fixed for the completion of the contract for the cut granite, namely, April 17, 1906, which would restrict the time limit to April 17, 1908.

I think that the latter construction is correct, and that the contract contemplates a delivery of the rough granite for the pavilion and dome within two years from the date of the completion of that portion of the contract for the cut granite, which is fixed by paragraph 43 of the specifications at one year and a half from the date of the acceptance of the contract. The clause in paragraph 5 of the articles of agreement, quoted above, which provides that "such waiver of the time * * * shall in no other manner affect the rights or obligations of the parties," shows clearly that it was not the intention to permit any possible waiving or extension of the original time limit which might seem necessary or expedient, to interfere with the prompt fulfillment of an obligation depending upon the completion of the contract, for which an ample time margin had already been provided. For the purposes of this supplemental obligation the time expressly fixed by the specifications for the completion of the contract must remain the starting point for the running of the supplemental period, and not the date at which the contract was completed in fact under the extension of time granted.

The contractor also contends that the action of the superintendent of construction in withholding payments on account of the delay in supplying the granite stock for the pavilion and dome is not authorized under the contract.

It appears that the superintendent, who theretofore had paid for the rough granite in monthly installments, notified the contractor on February 8 last that, owing to the slow progress made in the delivery of the granite, of which hardly two thirds had as yet been quarried, he might feel warranted in withholding payments on the stock until a much better progress had been made in the quarrying. He subsequently withheld payment for the February deliveries, amounting to $2,444.76, for which representatives of the company have made demands, claiming that under the terms of the contract payments for the rough stock are due as fast as the stone is placed upon the cars at the quarry, without regard to the provisions of the contract regulating payments, which they assert are applicable only to the work in connection with the cut granite.

The articles of agreement (paragraph 11) provide that "payment shall be made * * * as prescribed in paragraph 41 of the general conditions hereto attached and forming part of this agreement." Paragraph 41 of the general conditions, which is by no means definite or satisfactory, says:

"41. Payments shall be made from time to time as the progress of the work may warrant. A percentage of ten per centum will be reserved from each payment until the whole of the *cut granite* called for by the annexed contract shall have been satisfactorily delivered and accepted."

Paragraph 43 of the specifications provides that "payments in general will be regulated by the promptness, system, and good progress made by the respective contractors in fulfilling the time schedule above laid down." The time schedule referred to specifies the times within which the *cut granite* for the walls shall be furnished and delivered.

It will be observed that these provisions refer expressly and solely to payments in connection with the work of furnishing the *cut granite*, and the conclusion seems unavoidable that they do not apply to payments for the stock

granite and ought not to be construed as covering that portion of the contract. I am unable to find anything further in the documents forming the contract which relate to the matter of payments, except the provisions of paragraph 5 of the articles of agreement, already referred to; and it would seem that the only way in which the superintendent of construction could exercise his authority over payments for the rough granite would be, in the event of an extension of time being allowed, to deduct "all expenses for inspection and superintendence and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion," as provided in paragraph 5.

Answering, then, the specific questions formulated, I have the honor to advise you that the contract requires the delivery on cars at the Bethel quarry of all of the granite stock for the south pavilion and dome of the new National Museum building within two years from the completion of the contract, that is to say, on or before April 17, 1908; and that payments therefor may be made as heretofore in monthly installments at the stipulated price. But I am constrained to hold that under the terms of the contract, which in this respect are unfortunate, the superintendent of construction is without authority to withhold payment for any of said granite after the same has been accepted.

Very respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

BALTIMORE AND POTOMAC RAILROAD COMPANY—RIGHT OF WAY ALONG ANACOSTIA RIVER, D. C.

The construction by the Baltimore and Potomac Railroad Company, under the acts of Congress of February 5, 1867 (14 Stat., 387), and March 18, 1869 (16 Stat., 1), of what is known as its "curved" line of road along the northern shore of the Eastern Branch of the Potomac River between south L and south M streets, in the District of Columbia, and its open and notorious operation of that line ever since its construction prior to 1870, with the tacit consent of Congress and of the Executive authorities, give to that company the same rights to maintain and operate said line which it would have had if this route had been specific-

ally designated in the acts which authorized the construction of the road within the District.

The construction by that company of what is known as its "straight" line of road along the northern shore of the Eastern Branch of the Potomac River, in the District of Columbia, under the acts of February 5, 1867, and March 18, 1869; its payment of the sum of $20,000, fixed by the Secretary of War under the act of May 14, 1888 (25 Stat., 138), as the additional expense of construction of the bridge across the Eastern Branch of the Potomac River, by reason of the change of plans to avoid interfering with the operation of its "straight" line of road; and its use of said line ever since its construction, with the knowledge of Congress and of the officers having such matters in charge, and without objection by either, vested in that company the same right to have, maintain, and use its "straight" line of road that it would have had if such right had been expressly granted.

Since the Maryland charter of the railroad company allows a width of 66 feet for the right of way, and since the act of Congress of February 5, 1867, gives the same right and privilege in this respect, and since the location and construction of the "curved" and "straight" lines of road were upon this basis, the right of way of the railroad company on each of these two lines is 66 feet in width; that is, 33 feet on each side of a line midway between the inner rails of each track.

This right and interest of the railroad company is a perpetual easement for railroad purposes, leaving in the United States only the naked fee, with a possibility of reverter of the beneficial use.

The conveyance of square 1137 and part of square 1117, in the city of Washington, District of Columbia, to Sidney Bieber, authorized by section 21 of the act of June 30, 1906 (34 Stat., 787), should be such as to enable the purchaser to assert any right which the United States could rightfully assert and no other. It can not, however, determine what this interest is or fix the respective rights of the purchaser and the railroad company. Streets within the lands to be sold should be excepted from the conveyance.

The easement of the railroad company to have and maintain its said "curved" and "straight" lines of road does not extend to nor include the right to occupy the space between these two rights of way with sidetracks, or otherwise.

Unlike grants by private persons, grants of public property or rights are construed against the grantee, and pass nothing beyond what is granted expressly or by necessary implication.

The inquiry as to whether, in view of the fact that this water front may in future be needed by the Government in connection with any improvement of the Anacostia River, the Secretary of War should withhold the execution of the conveyance of the

premises until the matter can be submitted to Congress for its further consideration, raises a question of propriety and expediency rather than of law, upon which the Attorney-General can not advise.

DEPARTMENT OF JUSTICE,
April 14, 1908.

SIR: In your note of October 12, 1907, with its various accompanying papers, you ask my opinion in substance upon the following questions:

(1) What are the rights of the Pennsylvania Railroad Company to the lands occupied by the line of its railway (main line) through the premises mentioned in these documents, and also to the ground used by it for side tracks, and other like purposes?

(2) Whether the findings of the board of officers as to value may properly be approved by this Department? and

(3) Whether, in view of the fact that it is thought that the water front may, in future, be needed by the Government in connection with any improvement of the Anacostia River, which may, in the future, be authorized, the Department may legally withhold the execution of the direction contained in section 21 of the act of June 30, 1906 (34 Stat., 787), to convey the premises to Sidney Bieber, until the matter can be submitted to Congress for its further consideration.

I must express my regret that in this case the request of this Department, so often made, which requires that a request for an official opinion shall so formulate a precise question that it may be answered as a question of law and be accompanied by a statement of facts should have been disregarded.

The question of the title to the lands in question as between the United States or its vendee and the railroad company, can not be conclusively determined in this extrajudicial way, and the main purpose of this inquiry is to ascertain, as far as can be done in this manner, the portions of the lands in question to which the railroad company has title or right in order to determine what por-

tions should be paid for by the purchaser and embraced in the deed to be made.

By section 13 of the Act of March 2, 1907 (34 Stat., 1236), it is provided—

"That the Secretary of War be, and he is hereby, authorized and directed to convey to the purchaser from the United States of square eleven hundred and thirty-one, and the south part of square eleven hundred and seventeen, and the squares south of squares eleven hundred and twenty-three, eleven hundred and forty-eight, and eleven hundred and forty-nine, in the city of Washington, all the interest of the United States in the land lying south of the squares so purchased and between them and the channel of the Anacostia River, upon payment by such purchaser into the Treasury of the United States of such sum of money as the said Secretary of War, upon consideration of all the circumstances, shall determine proper to be paid for the said land; and the surveyor of the District of Columbia is hereby authorized and directed to mark out such land and determine the acres and to record a plat thereof."

The Baltimore and Potomac Railroad Company was originally chartered by act of the legislature of Maryland (May 6, 1853, ch. 194) with power to make lateral branches and connect with other railroads. The width of this right of way was fixed at 66 feet, except that, at or near stations, a greater width might be used; and the company was authorized to lay and use as many tracks therein as it chose, and to acquire this land by purchase or condemnation.

By the act of Congress of February 5, 1867 (14 Stat., 387), the Baltimore and Potomac Railroad Company was authorized to—

"extend into and within the District of Columbia a lateral railroad, such as the said company shall construct or cause to be constructed in a direction towards the said District, in connection with the railroad which they are about to locate and construct from the City of Baltimore to the Potomac river, * * * and the said Baltimore and Potomac Railroad Company are hereby authorized to exercise the same powers, rights, and privileges, and shall

be subject to the same restrictions, in the extension and construction of the said lateral railroad into and within the said District, as they may exercise or are subject to under and by intent of their said charter or Act of Incorporation, in the extension and construction of any railroad within the State of Maryland; and shall be entitled to the same rights, compensations, benefits, and immunities, in the use of the said road, and in regard thereto, as are provided in their said charter, except the right to construct any lateral road or roads within the said district, * * *; it being expressly understood that the said Baltimore and Potomac Railroad Company shall have power only to construct from the said Baltimore and Potomac Railroad one lateral road within the said District to some point or terminus within the City and County of Washington, to be determined in the manner hereinafter mentioned."

The act of March 18, 1869 (16 Stat., 1), after reciting in the first section that the Baltimore and Potomac Railroad Company, by the act last above mentioned, was authorized to extend its road into the District of Columbia, provides that it—

"may enter the City of Washington with their said railroad and construct the same within the limits of said City on and by whichever one of the two routes herein designated the said Company may elect and determine upon, that is to say: * * * Second. Beginning at some point on the northern shore of the eastern branch of the Potomac river between south L and south M streets; thence westwardly between said streets, etc."

This second route is the one which was selected and upon which the road was constructed and still remains, and the one by which, between south L and south M streets, it enters the city; and this point is therefore the one so designated for entrance into the city.

As first located, it was intended that the road, after crossing the main channel of the river, should proceed by substantially a straight line down the river following the shallow water upon trestles to the point where it was to enter the city; but because of treacherous foundations it was located by a curved line to the northwestward and

nearer the shore, but turning eastward again, it reached the same point between south L and M streets; and two main tracks were placed on that line. This will be mentioned hereinafter as the "curved line."

This was constructed and in operation in 1870, and has so continued ever since; and until after 1889, was the only main line of the road within said district.

As there was no more particular designation or restriction of route than that contained in and elected under the act of 1869, and as the construction and operation were open, notorious, and with the tacit consent of Congress and the Executive authorities, I am of opinion that the construction upon this curved line was rightful and legal and gave to the company the same rights with reference thereto which it would have had if this route had been specifically designated in the acts which authorized the construction of the road within the District.

But those acts gave the right to only one right of way, 66 feet wide, and when the company had selected this route and constructed its road thereon, its legal power in this respect was exhausted. So that its right to construct or maintain its second, or what is hereafter called the "straight line," must arise, if at all, from other sources, and not from the statutes above referred to.

As already stated, this straight line was the one originally intended, and is laid down on some of the maps. It lies between the point where the curved line turns to the northwest and the point between south L and M streets. Since its construction, this has been and is one of the main lines of said road in the District, with two tracks, and is used mainly for passenger trains, while some of the freight trains go over the curved line. The claimed right to this straight line is based upon the following facts:

All of the lands here in question and all which are occupied by the railroad company on the northwest side of the present river above the point of entrance into the city are made ground, formed by dumping earth and other materials by the railroad company and the District authorities into the river, thus extending the land from the former shore into the present water edge near the Pennsylvania Avenue Bridge, the construction of which was begun

under the act of February 23, 1887 (24 Stat., 412). Both of these lines of railroad pass under its western end.

As it was in process of construction, it was found that one of the piers would stand directly in the line of the aforesaid straight line of the railroad company and would prevent its construction or use and leave no room for any other than the curved line. The railroad company protested, claiming the right to construct and use the straight line and claiming that this was the original and proper main line of its road.

A suit was begun to determine the rights of the parties when Congress took the matter in hand. The whole subject was thoroughly discussed and considered, the main question being whether the company should be permitted to construct and use the straight line, which would necessitate the making another span at the western end of the bridge, and locating the pier in another place.

This resulted in the act of May 14, 1888 (25 Stat., 138), which provides:

"That the Secretary of War be, and he is hereby, authorized in his discretion to make such alterations in the plan of the bridge across the Eastern Branch of the Potomac River at the foot of Pennsylvania avenue east as will best accommodate the traffic over and under said bridge, and for said purpose the sum of sixty thousand dollars, or so much thereof as may be necessary, to be immediately available, be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated: *Provided*, That the Baltimore and Potomac Railroad Company pay their fair and just proportion of the cost of said alteration at the west end of said bridge, to be determined by the Secretary of War."

Under this act, the plan of the bridge at its west end was changed by adding another span, and placing the pier at a point where it would not interfere with either of the two railroad lines, and the bridge was so constructed and the Secretary of War fixed the portion of the additional cost which the railroad company should pay at $20,000, which was paid.

As the right to the curved line had become and was a vested right in the company, and as the new arrangement for the bridge had no provisions for the abandonment or discontinuance of that line, and as the change directed was such as would best accommodate the traffic under the bridge (since there was no traffic except that of the railroad company) it must be taken that the statute and action thereunder had reference as well to the existing traffic as to that upon the contemplated straight line for which especially the change was made, and must be taken as a recognition and authorization of both lines.

Under the authority and right supposed to be thus conferred, the railroad company constructed the straight line, intersecting said curved line at the point between L and M streets with two tracks; which has ever since been used as its main line, with the knowledge of Congress and the officers having such matters in charge, and without objection by either. I do not understand that anyone on behalf of the United States disputes the right of the company to maintain and use both the straight and curved lines. It is the contemplated purchaser who is insisting upon the right of the United States, since the use of both lines diminishes the quantity of land to be sold and conveyed.

The space between the curved and straight lines is occupied by sidetracks, sidings and switches of the railroad company, and all these and the main lines of the company at the points now considered are within the tract of land in which the interest of the United States is directed to be sold. This would be the whole estate in the lands but for the rights of the railroad company.

Upon these facts, I am of opinion—

First. That by the charter of the Baltimore and Potomac Railroad Company, the acts of Congress of 1867 and 1869, above referred to, and the construction and use of the curved line, without objection, the railroad company acquired the same right that it would have had if this line had been designated in the acts referred to.

Second. That by the facts above recited relative to the bridge and the act of 1888, and the construction and use without objection of the aforesaid straight line, the rail-

road company acquired the same right to have, maintain, and use this as one of the main lines that it would have if such right had been expressly granted.

Third. That since the Maryland charter of the railroad company allows the width of 66 feet for the right of way and since the above act of 1867 gives the same right and privilege in this respect, and since the location and construction of these lines were upon this basis, I think the right of way of the railroad company on each of these two main lines is 66 feet in width.

Fourth. That this right and interest of the railroad company is a perpetual easement for railroad purposes, leaving in the United States only the naked fee, with a possibility of reverter of the beneficial use; but as is said in 10 American and English Encyclopædia of Law, 1150, citing various cases:

"Where by virture of the power of eminent domain the right is acquired to occupy and use the surface of land perpetually for a given purpose, the bare fee left in the owner is for all practical purposes valueless, and it is not error to assess the damages as if a fee were taken."

It makes no difference in this respect, whether the land was acquired by condemnation or by purchase, or donation, express or implied. But while the land thus held by the railroad company should not be included in fixing the price to be paid, still this naked legal title is an "interest of the United States" which is directed to be sold, and care should be taken to convey only the naked legal title in such portions, and subject to any and all rights, easements, and privileges of the railroad company.

While the railroad company is entitled to these two lines of main track, each 66 feet in width, it is conceded on both sides that there is nothing except the rails to indicate the precise locality or boundaries of either right of way. Although there is some evidence that on said curved line the tracks near the bridge aforesaid were near the northern side of this right of way, yet I think that in the absence of definite proof of other location, the boundaries should be taken to be 33 feet on each side of a line midway between the inner rails of each track.

As your conveyance will convey and purport to convey only whatever interest the United States has in these lands, that conveyance can not determine what this interest is or fix the respective rights of the purchaser and the railroad company. It should be such as to enable the purchaser to assert any right which the United States could rightfully assert and no other.

If there are any streets within the lands directed to be sold, I think it should be assumed that the United States did not intend to dispose of or part with its title to or control of them, and they should be excepted from the conveyance.

I do not think that the easement of the railroad company to have and maintain the said two main lines of its road, extends to or includes the right to occupy the space between these two rights of way with side tracks, or otherwise. The grant in the Maryland charter of greater width "at or near stations" refers to places in close proximity to stations and to such width for purposes connected with the stations. Unlike grants by private persons, grants of public property or rights are construed against the grantee, and pass nothing beyond what is granted expressly or by necessary implication. The right to have and maintain these two lines of railroad does not include the right to side tracks also. As title by prescription from adverse possession can not be asserted against the United States no account may be taken of the occupancy by the railroad company.

As to findings of the board of officers, they may be availed of for your information and in aid of your judgment, although it is your own judgment which is to be exercised and the determination of the amount proper to be paid is for you. The direction of the act is that the premises shall be conveyed upon payment "of such sum of money as the said Secretary of War, upon consideration of all the circumstances, shall determine proper to be paid for the said squares." This confers a wide power and discretion to determine the price not merely by the present or market value of the lands, but also according to what, "in consideration of all the circumstances," should be paid.

Your third question raises a question of propriety and expediency rather than a question of law for this Department.

Considering the situation of these lands with their long water front now within the city, and the probable need for them in necessary public improvements, I quite agree with you that their sale at this time to a private individual is of very doubtful expediency, and that, if the attention of Congress were called to this, it would probably revoke its order for the sale.

The reason for suspending action under the law, for the present, is the assumption that Congress has acted inadvertently and without full information. The propriety of proceeding on this assumption is a question for your Department only.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

PROTECTION OF SEAL ROOKERIES ON PRIBILOF ISLANDS.

The guard maintained by the United States on the Pribilof Islands for the purpose of protecting the seal rookeries thereon, were justified in using all necessary means at their command in resisting the landing on those islands of armed Japanese from armed vessels for the purpose of killing seals and of appropriating their skins, and in firing upon them after they had refused to surrender and attempted to escape with the skins of the slaughtered animals.

The United States has the undoubted property rights, as well as rights of sovereignty, in the living seals on the Pribilof Islands, and is justified, as any other property owner would be, in protecting those rights from violent invasion; and if, in attempting to violate those rights, the invader meets death or injury, there is no greater reason for complaint than there would be for a burglar, discovered in rifling the premises he had feloniously entered, to complain if he were shot by the owner.

It is not less clearly unlawful by the law of nations for a band of foreigners, more or less fully armed, to invade the territory of a sovereign power with the deliberate purpose to violate its laws and misappropriate its property, than it is a felony by the common law for one to break by night into the dwelling of another with felonious intent.

Article 1 of the Treaty of November 22, 1894 (28 Stat., 848), with Japan can not be construed as giving to the Japanese greater privileges than are conferred upon our own citizens, or as depriving either American citizens, or the Government in its corporate capacity, of the natural and universal right of self defense for person or property, and of resisting by force a lawless force of law-breakers merely because the latter happen to be Japanese.

DEPARTMENT OF JUSTICE,
April 15, 1908.

SIR: I have the honor to acknowledge the receipt of a letter wherein you say:

"I have the honor to inclose herewith a copy of a dispatch, dated July 20, last, and of the inclosure thereto, from the American ambassador to Japan, on the subject of the killing of Japanese subjects while they were engaged in raiding the fur-seal rookeries on the Probilof Islands.

"I also inclose a copy of a note, dated August 12, last, from the Japanese ambassador on the subject.

"This Department would be glad to have an expression of opinion from your Department as regards the matter covered by the Japanese note, in view of the facts of the case as reported by Mr. Edward W. Sims, the Solicitor for the Department of Commerce and Labor, and as developed upon the subsequent trial of the pelagic sealers, in order that an appropriate answer may be made to the Japanese embassy.

"Extracts from Mr. Sims's report are inclosed herewith, which I beg to request that you will return to this Department after they have served the purpose of this letter."

To understand the full purport of your inquiry it is necessary to state briefly the facts as shown by the documents accompanying your letter. From these it appears that some 12 to 15 Japanese vessels, having crews on the average of some 30 men each, carrying, in some instances, cannon, and, so far as known, in all cases, guns, clubs, knives, and other weapons, approached the seal islands and landed parties thereon, which parties killed, skinned, and removed a number of seals from their rookeries, or breeding grounds, beside killing and removing a number of

seals within the limits of marine jurisdiction by the United States within the waters surrounding these islands. A guard maintained by the Government for the protection of these islands interrupted some of these marauders in their depredations, and, as they refused to surrender and attempted to escape with the skins of the slaughtered seals, fired upon them, killing some and wounding others. Other boats which were discovered approaching the shore with the evident purpose to commit the like depredations were fired upon by the guard and driven away, and there is reason to believe that some casualties occurred among their crews. A certain number of the raiders surrendered to the guard, were taken prisoners, and subsequently were tried in an Alaskan court. I have stated the facts very succinctly, but what I have said suffices to show that there was a landing on the territory of the United States of armed parties of foreigners, all of whom, it is reasonable to suppose, made this landing with the purpose to destroy the seals in their rookeries, and some of whom accomplished this purpose. There is also good reason to believe that the boats which were repulsed by the guard, or driven away before they had committed any depredation on land, had been engaged in killing and appropriating seals within the territorial jurisdiction of the waters of the United States, with the knowledge that such killing was prohibited by our Government.

In animals, *ferœ naturæ*, it has always been held that the State had, by virture of its sovereignty, a right of property. In Pothier it is said (No. 32):

"The right belongs to the king to hunt in his dominion; his quality of sovereign gives him the authority to take possession above all others of the things which belong to no one, such as wild animals: the lords and those who have a right to hunt hold such right but from his permission, and he can affix to this permission such restrictions and modifications as may seem to him good."

Blackstone (2 Comm. 410), says:

"There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such

animals *feræ naturæ*, as are known by the denomination of *game*, with the right of pursuing, taking, and destroying them; which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery."

These views are endorsed in *Geer* v. *Connecticut* (161 U. S., 519); which is itself reaffirmed in *Hudson County Water Co.* v. *McCarter* (209 U. S., 349). It may safely be stated that the decided weight of well considered authority holds the unlawful and violent misappropriation of game, in itself, an outrage upon not only the authority, but upon the property rights of the local sovereign.

It is true that some authorities hold that sometimes a right of killing or capturing game is vested in the owner of the land where the animal is found. Blackstone says (2 Comm., 394):

"A man may, lastly, have a qualified property in animals *feræ naturæ*, *propter privilegium:* that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty; and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases."

Mr. Justice Field, in his dissenting opinion in *Geer* v. *Connecticut*, says on this point (161 U. S., 539):

"Although there are declarations of some courts that the State possesses a property in its wild game, and when it authorizes the game to be killed and sold as an article of food it may limit the sale only for domestic consumption, and the Supreme Court of Errors of Connecticut in deciding the present case appears to have held that doctrine, I am unable to assent to its soundness, *where the State has never had the game in its possession or under its control or use.*"

With regard to the seals still in their rookeries, however, this distinction is immaterial. The animals were not only within the territorial limits but within the public lands of the United States, and from their peculiar conformation and habits they were, in fact, under the physical control

and subject to the exclusive use of the United States, represented by its duly authorized agents on the islands. Under these circumstances, even if it were held that the seals were the property of no one, as is apparently held of all wild animals in the Digest, still the land holder would be none the less injured in his rights by their destruction and removal against his will; since, in the language of the Digest:

"He who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purpose to do so." Digest, Book 41, Tit. 1, De Adquir. Rer. Dom.

In my opinion, however, the United States had undoubted property rights as well as rights of sovereignty in the living seals killed on the island in question. It was justified, as any other property owner would be, in protecting these rights from violent and outrageous invasion, and if the invaders and robbers met with death or injury in the attempt to consummate their wrongful purpose, there is no greater reason to complain of what befell them, than there would be for a burglar, discovered in rifling premises he had feloniously entered, to complain if he were shot by the owner. It is no less clearly unlawful by the law of nations for a band of foreigners, more or less fully armed, to invade the territory of a sovereign power with the deliberate purpose to violate its laws and misappropriate its property, than it is a felony by the common law for one to break by night into a dwelling of another with felonious intent. Moreover, I do not think we are bound to inquire too closely as to whether, in point of fact, it was necessary for the protection of the public property committed to their charge for the guards on the island to inflict all the injuries they did on the poachers, any more than a householder finding an armed burglar on his premises would be bound to speculate as to whether he could or could not eject the latter without the use of a deadly weapon. The agents had good reason to believe that the island was surrounded by a predatory force much stronger than the guard itself, and as soon as the hostile and injurious purposes of these outlaws became evident, they were, in my opinion, justified in resisting the accomplishment of these purposes with all

the means at their command. It is true that, in some instances, the Japanese seem to have been attempting to escape when they were fired upon, but the guard might reasonably think that they were carrying off seal skins, which, no less than the seals they had undoubtedly been taken from, were the property of the United States, and such carrying away would seem to have been a fact with regard to the majority, at least, of the retreating poachers.

Independently, however, of the last-mentioned consideration, I can not find in the papers submitted any sufficient reason to believe that the guard used greater force or inflicted greater injury than was reasonably necessary, under all the circumstances of the case, for the protection of the public property committed to its charge, or justified as a measure of self-defense.

In the correspondence transmitted with your letter there appears to be a misapprehension as to the grounds of justification for the acts of the guard. The Japanese who were killed or injured during their raids were not punished for a crime of which they had been convicted. They were killed or injured to prevent their committing a crime. The guards were, it is true, in the employ of the United States, and, in that sense, public servants; but they did no more than any private property owner and his servants would have been justified in doing to protect his premises and his property from violent and unlawful invasion and injury. It is quite true that our treaty with Japan of 1894, article 1, guarantees the subjects or citizens of either party full liberty to enter, travel or reside in any part of the territories of the other party, and provides that they "shall enjoy full and perfect protection for their persons and property"; they are to have free access to the courts, the right to employ lawyers, "and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects."

If, however, a number of Americans had gone to the seal islands and attempted to kill the seals in their rookeries, the guard might lawfully, and doubtless would, have treated this band of robbers as the Japanese were treated

on this occasion. The treaty can not be construed as giving foreigners greater privileges than are conferred upon our own citizens; or as depriving either American citizens or the Government, in its corporate capacity, of the natural and universal right of self-defense for person and property, and of resisting by force the lawless force of lawbreakers merely because the latter happen to be foreigners. These depredators who surrounded the lonely islands and attempted, unfortunately with a large measure of success, to destroy the property committed to the charge of the guards, brought whatever injury they suffered upon themselves by their participation in a wholly unjustifiable enterprise. The agents who defended the Government's property in their charge committed, in my opinion, no offense under our laws, if the facts and circumstances are such as disclosed by the papers transmitted with your letter. Any attempt to prosecute them for homicide or assault would be, in my judgment, unquestionably futile, and they seem to me deserving rather of praise for their fidelity and courage than of punishment because of the injury they inflicted on the robbers who were killed or wounded.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF STATE.

PHILIPPINE ISLANDS—ESTABLISHMENT OF A GOVERNMENT AGRICULTURAL BANK.

The Philippine legislature may legally and constitutionally enact suitable laws authorizing the Philippine government to open and conduct an agricultural bank, with a capital not exceeding $2,000,000, from funds now in its possession available for general appropriation.

The act of Congress of March 4, 1907 (34 Stat., 1282), authorizing the establishment of an agricultural bank by a banking company organized under Philippine laws, does not withdraw any power the Philippine government would otherwise have to establish a government agricultural bank, for the authority to charter and aid a private bank is no denial of the power to establish a government bank, which may exist independently under the Philippine scheme of governmental power.

DEPARTMENT OF JUSTICE,
April 16, 1908.

SIR: I have received your request for my opinion contained in a letter which quotes from a cablegram received by you from the governor-general of the Philippine Islands urging the desirability and necessity of establishing a Philippine government agricultural bank under legislation proposed to be enacted by the Philippine assembly, and then presents the question—

"whether the Philippine legislature may legally enact suitable laws authorizing the Philippine government to open and conduct an agricultural bank with a capital not exceeding two million dollars from funds now in its possession available for general appropriation."

The act of Congress approved March 4, 1907 (34 Stat., 1282), to which you refer, does not provide for a governmental bank of the kind in question, but for a governmental guarantee in support of a private bank.

That act in its first section authorizes the establishment of an agricultural bank by the Philippine government with a guarantee of 4 per cent dividends upon the cash capital invested by individuals or corporations, to a banking company organized under Philippine laws subject to certain restrictions as to loans, interest, limit of liability under the guarantee, and subject to regulations to be prescribed by the Philippine government including and covering the duty of making sworn reports.

The second section provides that payments made pursuant to the guarantee shall constitute a lien in favor of the Philippine government upon annual net profits subject to stockholders' right to receive limited dividends; and that in case of liquidation the government advances under the guarantee shall constitute a lien on assets subject to debts and of the repayment to stockholders of the authorized and paid up cash capital stock at par.

Section 3 forbids the holding of real estate beyond that required for business premises, unless acquired on account of a debt, in which case it must be sold within ten years.

The original authority of the Philippine government (arising under the war power) was defined in President

McKinley's instructions of April 7, 1900, to the Philippine Commission (1 Philippine Laws, p. LXIII), in which he laid down as inviolable rules for their guidance most of our constitutional guarantees, transferring the legislative authority from the military government to the Commission, and defining the scope of that authority in general terms. By the Philippine civil government act of July 1, 1902 (32 Stat., 691), Congress ratified the government established under the President's instructions, and generally approved the acts of legislation of that government (sections 1 and 2), imposed in the declaration of rights of section 5, for the most part, the guarantees specified in the President's instructions, provided for a census and territorial assembly (sections 6–9), and in the remaining sections recognized the judicial system established by the Philippine government and specifically authorized the Philippine government to legislate for the improvement of navigation and as to public lands; and, finally, in detailed provisions dealt with the disposal of mineral lands, the purchase of lands of religious orders, municipal bonds, franchises and coinage. Section 7 of that act transfers the legislative authority as follows:

"After said assembly shall have convened and organized, all the legislative power heretofore conferred on the Philippine Commission in all that part of said Islands not inhabited by Moros or other non-Christian tribes shall be vested in a legislature consisting of two houses—the Philippine Commission and the Philippine assembly."

That section goes on to provide for qualification of electors, eligibility of members of assembly and powers and duties of the assembly with reference to elections, returns, qualifications of members, quorum, etc., but does not express any limitation on the power of legislation.

Section 86 provides:

"That all laws passed by the government of the Philippine Islands shall be reported to Congress, which hereby reserves the power and authority to annul the same, and the Philippine Commission is hereby directed to make annual report of all its receipts and expenditures to the Secretary of War."

It seems clear to me that this organic act intends to recognize broadly and to validate the Philippine legislative power as conferred previously and as exercised, and expresses no limitation beyond the fundamental guarantees of the bill of rights; and that the authority specifically conferred upon the Philippine government relative to certain subjects of legislation and the express and particular legislation by Congress itself upon certain other subjects are to be viewed simply as enactments on matters wherein Congress was fully informed and ready to act, and not as implying any restriction upon the local legislative authority in other matters; and that Congress is content to permit the Philippine government to enact laws unrestricted, subject to the reserved power of annulment. Accordingly, since the organic act was passed, as before, the Philippine Commission has passed numerous laws covering the field of general jurisprudence and the entire range of administrative government, and I can find no later laws of Congress between the act of 1902 and the agricultural bank act of 1907 which tend to disprove the theory of the organic act and the relation of Congress to Philippine legislation which I have just expressed.

The decision in the case of *Dorr* v. *United States* (195 U. S., 138), respecting the Philippine law of criminal libel, sustained in general the validity of Philippine legislation, and held that in the authority to legislate, founded in the war power and defined by the President and finally ratified by Congress, there was no illegal delegation of legislative authority by the ratifying act.

I do not think that the act of Congress of 1907 withdraws any power the Philippine government would otherwise have to establish a Government agricultural bank. The authority to charter and aid a private bank is no denial of the power to establish a Government bank which may exist independently under the Philippine scheme of governmental power.

As to the fundamental limitations imposed by the Philippine bill of rights affecting this matter, the particular clause is "that no law shall be enacted in said islands which shall deprive any person of life, liberty, or property with-

out due process of law, or deny to any person therein the equal protection of the laws." It is to be noted that the guarantee "that private property shall not be taken for public use without just compensation," which appeared in President McKinley's instructions, does not appear in the bill of rights (sec. 5, act of July 1, 1902), just as the guarantee of the right of trial by jury appears in neither the instructions nor the bill of rights. But whatever the reason may have been for the omission of the express language relative to the taking of private property for public purposes, I entertain no doubt that this historic and established principle of Anglo-Saxon government and jurisprudence accompanies the power of the United States in the Philippine Islands and is sufficiently embraced and implied in the clause of the bill of rights which I have quoted above.

It does not seem to me that such authorities as *Loan Association* v. *Topeka* (20 Wall., 655), *Parkersburg* v. *Brown* (106 U. S., 487), or *Cole* v. *La Grange* (113 U. S., 1), apply to the present case. In those cases municipal bonds had been used either as a gift or as a loan to establish or maintain private manufacturing enterprises.

The Supreme Court held that this was taking private property (through taxation) for a *private* purpose; that such a debt for such a purpose to be paid in the future out of taxes to be levied could not be contracted. But those decisions intimate that if a municipal corporation has a fund or other property out of which it can pay the debts which it contracts without resort to taxation the legislature may authorize it to use this fund in aid of private or personal projects which, however collaterally, contribute to the public good; and it is to be noted that in the present case your letter says the Philippine government has sufficient funds for the proposed purpose now in its possession available for general appropriation.

Independently of these considerations, a series of decisions such as *Township of Burlington* v. *Beasley* (94 U. S., 310), and *Blair* v. *Cuming County* (111 U. S., 363), hold that municipal bonds issued to aid the construction or operation of a custom grist mill are valid, because the pur-

pose is public. As the Court says in the last-mentioned case (pp. 372, 373):

"Enterprises of a class within which that in the present case falls are so far of a public nature that private property may be appropriated to carry them into effect. *Boston & Roxbury Mill Corp.* v. *Newman*, 12 Pick. 467; *Commonwealth* v. *Essex Company*, 13 Gray, 239, 249; *Lowell* v. *Boston*, 111 Mass. 454, 464; *Scudder* v. *Trenton Delaware Falls Co.*, 1 Saxton Ch. 694; *Beekman* v. *Saratoga & Schenectady Railroad Co.*, 3 Paige, 45. And when the legislature has given to grist mills and the water-power connected with them such a public character as in the present case, the improvement of the water-power must be regarded as a public work of internal improvement, which may be aided in its construction by the issue of bonds, under the act in question."

In the present case there can be no ambiguity as to the public purpose. A bank has been always held to be a public agency, and the institution of such a bank as is here proposed, since agriculture is the prevailing and preponderant occupation of the Philippine Islands and the very basis of the whole people's existence, would be clearly created for the benefit of the Philippine Islands and the people at large.

I am therefore of opinion that the proposal is not in violation of the constitutional limitations in question, substantially for the same reasons which caused the project to establish the Bank of the United States to be held by the Supreme Court in harmony with the Constitution. It is true that in *M'Culloch* v. *Maryland* (4 Wheat., 316), the precise points decided were that Congress had power to *incorporate* a bank and that a State could not tax it; but Chief Justice Marshall reached these conclusions by determining first that a bank was in itself an appropriate agency of government to assist the Congress in exercising its power to lay and collect taxes and its power to borrow money (both of which powers are conferred upon the Philippine Government), and secondly that a corporation may be created to provide this agency. There can be no doubt that according to this opinion, the Congress could

exercise these powers of government through a bank established and conducted by the Government as well as through the medium of an incorporated banking institution with private subscribers and capital stock. In discussing the right of the State of Maryland to tax a branch of the bank located in that State, the Chief Justice declares the bank an instrument of government, and as such, removed from the power of State taxation, an instrument "employed by the Government in the execution of its powers," which he compares to the mails and the mint as governmental instrumentalities, means, and processes.

Upon the papers submitted, I am of opinion and advise you that the Philippine legislature may legally and constitutionally "enact suitable laws authorizing the Philippine government to open and conduct an agricultural bank, with a capital not exceeding two million dollars, from funds now in its possession available for general appropriation."

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

NAVAL OFFICERS—RETIRED PAY OF MATES.

It was not intended, in the opinion of October 15, 1907 (*ante*, p. 433), to define any particular rate of pay which mates should receive on retirement, or to say more than that they were entitled under the act of June 29, 1906 (34 Stat., 554), to the rank and retired pay of the next higher grade.

The retired pay of a mate in the Navy, whether retired under section 11 of the navy personnel act of March 3, 1899 (30 Stat., 1007), or under the act of June 29, 1906 (34 Stat., 554), is the retired pay of a warrant officer with the same length of previous service, which is three-fourths of the sea pay of such officer.

Retirements under the act of June 29, 1906 (34 Stat., 554), and under section 11 of the navy personnel act of March 3, 1899 (30 Stat., 1007), are in effect the same as regards the amount of pay. Under the act of 1899 an officer is retired with "three-fourths of the sea pay" of the next higher grade, and under the act of 1906 he would be retired with the "retired pay" of the next higher grade, which, under the act of March 3, 1873 (17 Stat., 547), is "seventy-five per centum" of the sea pay of such higher grade or rank.

The sea pay of a warrant officer under section 1556, Revised Statutes, is a variable quantity, ranging by varying sums from $1,200 to $1,800 per annum, according to length of service, any one of which may, in a sense, be said to be the sea pay of a warrant officer.

The purpose of section 11 of the act of 1899, when applied to mates, was not to retire them with three-fourths of the lowest sea pay given to a warrant officer, but to give them three-fourths of the varying sea pay of such officers, upon the same conditions, which conditions include length of previous service.

A retired mate in the Navy may be credited with his prior service in the Navy at the date of his retirement in determining his classification for pay.

Mate William Jenney, of the Navy, retired, became entitled, under section 11 of the act of March 3, 1899, to advancement from the date of his retirement on September 26, 1899, and not from the date of the Department's letter to him of November 26, 1907.

DEPARTMENT OF JUSTICE,
April 18, 1908.

SIR: In your letter of April 1, 1908, with its inclosures, you informed me that a portion of the opinion of this Department dated October 15, 1907 (*ante*, p. 433), is construed in a way which, perhaps, may do injustice to certain officers of the Navy, there referred to, and you ask my opinion upon the following questions:

"1. Whether the expression 'the lowest grade of warrant officers' should be restricted to the lowest pay grade?

"2. Whether a retired mate in the Navy belonging to the category referred to in the Attorney-General's opinion of October 15, 1907, may be credited with his prior service in the Navy at the date of his retirement in determining his classification for pay?

"3. When did Mate William Jenney, U. S. Navy, retired, become entitled to advancement, whether at the date of his retirement, September 26, 1899, or from the date of the Department's notification to him of November 26, 1907?"

Your first question is answered in the negative. It was not the intention, in that opinion, to define any particular rate of pay which mates should receive on retirement, or to say more than that they were entitled under the provision referred to, to the rank and retired pay of the next higher grade. The question of the particular rate of pay to which they were entitled was not before me and was

not considered. There was nothing to inform me then how many grades there were of warrant officers, or whether more than one; but, following the uniform rule for the promotion of the lower officers of the Navy, that is, by a single step from the lower to the next higher grade, I used the expression referred to in the opinion. And if, as appears to be the case, there is but one grade of warrant officers, the expression used refers to that, as being both the lowest and highest grade.

The questions now submitted are different, in that they inquire as to this rate of pay, and my views on this subject are expressed in the following answer to your second and third questions. Referring to these questions, section 11 of the navy personnel act of March 3, 1899 (30 Stat., 1007), provides for the retirement of certain officers, with the rank and three-fourths the sea pay of the next higher grade. As Mate Jenney comes within the description of the officers there referred to, and was retired September 26, 1899, he should have been retired under that section, as of that date, with three-fourths the sea pay of a warrant officer, the next higher grade.

But, what is the sea pay of a warrant officer? By reference to section 1556, Revised Statutes, we find that this is a variable quantity ranging by varying sums, from $1,200 to $1,800 per annum by three-year periods of service; and that, for the first three years a warrant officer gets $1,200; and after twelve years' service, $1,800 per annum with other rates for intermediate three-year periods. Either one of these may, in one sense, be said to be the sea pay of a warrant officer. But, neither one alone can, in any proper sense, be said to be the sea pay of that grade.

It is impossible to give to these mates, on retirement, three-fourths the sea pay of warrant officers, unless we give them just that amount, and upon the same terms and conditions affecting the amount as those affecting the pay of warrant officers; that is, if the amount of a warrant officer's pay depends upon certain terms or conditions, we can not give a mate three-fourths of the same pay, unless upon the same terms and conditions. If it is not increased by the same facts, or, if it is charged with greater burdens,

it is not the same pay. If a warrant officer's pay is increased by length of service, instead of being fixed and stable, it is impossible to give mates three-fourths of the same pay unless that also is affected by corresponding length of service. The purpose of this section, when applied to this class of officers, was not to retire these mates with three-fourths of the lowest sea pay given to a warrant officer, and it was not so said, but was to give to them three-fourths the varying sea pay of warrant officers upon the same conditions. The purpose of the section was to give to the retiring officer, broadly and generally, three-fourths of the compensation which, in the higher grade, is given for service at sea. If that is fixed and stable, so is that of the retiring officer. If it varies according to length of previous service, so also does the three-fourths thereof given to the latter officer, and from the same cause; so that the retiring officer receives three-fourths of the same pay that is given in the higher grade for sea service by one having the same length of previous service.

If Congress had intended either one of these particular rates of pay as the basis of this retired pay, it is certain that it would have said so. As it is not so said, it must be taken that it was not so intended. And this is made substantially certain, also, by the language of this section. It provides that the officers referred to shall be retired "with the rank and three-fourths the sea pay of *the next higher grade*." In this instance the sea pay of the "next higher grade" varies with three-year periods of service.

But it is this same varying rate of pay "of the next higher grade," and not any particular one of them, which is made the basis of the retired pay there referred to. The way to give these mates three-fourths of this varying sea pay of the next higher grade is, of course, plain. If one of them has had three years' service he gets three-fourths the pay of a warrant officer, who has had that length of service. If he has had twelve years' service—and Mate Jenney has had much more than that—he gets three-fourths the pay of a warrant officer, with the same service. In short, the mates, being entitled to the rank and three-fourths the sea pay of warrant officers, should receive three-

fourths of the same pay which they would receive if they were warrant officers, instead of mates, all other circumstances connected with them remaining the same. I know of no other way by which to give to retired mates three-fourths of the sea pay of the next higher grade.

It follows that Mate Jenney should have been retired September 26, 1899, with three-fourths the sea pay of a warrant officer with twelve years of service, and that his advancement should be at and from that date and not from the date of the Department's letter to him, November 26, 1907, referred to in your question.

But your questions refer more specifically to retirements under the act of June 29, 1906, (34 Stat., 554); and as this act refers as well to officers who had then been retired, as to subsequent retirements, it is quite possible that Mate Jenney and others, retired under section 11 of the personnel act, may be retired under the act of 1906, if, for any reason, that is thought desirable.

As far as concerns any question here, the only difference in the pertinent provisions of the two acts, is the substitution in the later act of the words "retired pay" for "three-fourths the sea pay" of the next higher grade. This would give to mates on retirement, the retired pay of warrant officers—the next higher grade.

The act of March 3, 1873 (17 Stat., 547) provides, in substance, that the retired warrant officers, with other retired officers, shall receive "seventy-five per centum of the present sea pay of the grade or rank which they held at the time of retirement."

This sea pay of warrant officers is fixed as above shown, varying from $1,200 to $1,800 per annum. So that, if Mate Jenney, after being retired under section 11 of the personnel act, were now retired under the act of June 29, 1906, this would make no difference in the amount of his retired pay, for, under the former act, he would receive three-fourths the sea pay of a warrant officer, and, under the other, he would receive the whole of the retired pay of warrant officers, which is three-fourths the sea pay of such officer.

And, with the changes made necessary by the changed language of the later act, what is said above as to the

length of previous service in determining the rate of pay of warrant officers, and therefore the retired pay of mates, under section 11, referred to, is equally applicable in the cases of mates retired under the act of 1906. And they receive the retired pay of the next higher grade, that is, the retired pay of a warrant officer with the same length of previous service.

This, it is believed, covers the ground embraced in your second and third questions. Specifically your second question is answered in the affirmative. And, as to the third, I have to advise you that Mate Jenney, under the facts stated, was entitled to advancement from his retirement, September 26, 1899, and not from the date of the Department's letter to him of November 26, 1907.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE NAVY.

ATTORNEY-GENERAL—OPINION—EIGHT-HOUR LAW.

The Attorney-General declines to render an official opinion upon a matter submitted which involves the determination of questions of fact.

Presumably watchmen and messengers, if they are engaged in the work ordinarily assigned to such employees, are not subject to the provisions of the eight-hour law (27 Stat., 340).

DEPARTMENT OF JUSTICE,
May 7, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of April 29, calling attention to your request for my opinion as to whether certain watchmen, laborers, hostlers, and messengers, mentioned in the memorandum of the Acting Judge-Advocate-General, which you inclose, are within the provision of the eight-hour law.

In reply I regret to be obliged to inform you that the matters submitted to me involve the determination of questions of fact, and it is therefore impossible for me to comply with your request.

Before I can attempt to express an opinon, it will be necessary for you to submit a statement, showing in detail the duties of each employee to whom your request refers.

The eight-hour law (27 Stat., 340) applies to "all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia," etc.

Presumably watchmen and messengers, if they are engaged in the work ordinarily assigned to such employees, are not subject to the provision of the eight-hour law, but even on this I express no definite opinion until I am more fully advised of the facts.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

EIGHT-HOUR LAW—HOURS OF SERVICE OF LOCK TENDERS, ETC.

Persons employed as lock tenders, lock helpers, lockmen, and in similar employments at the locks of the various canals owned and operated by the Government may be called upon to perform service at any hour of the day, and such requirement is legal and proper under the eight-hour law (act of August 1, 1892; 27 Stat., 340), so long as the total service rendered does not exceed eight hours per day.

The eight-hour law includes skilled as well as unskilled workmen; and the employment of persons for a longer period than eight hours in any one day "when a dam is being raised or lowered" and the service is one "requiring skill and training" which "cannot safely be entrusted to inexperienced men," is not an employment in case of an "extraordinary emergency," and is a violation of that statute.

It is a familiar rule of construction that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided, if another and more reasonable interpretation is present in the statute.

DEPARTMENT OF JUSTICE,

May 11, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of April 29, ultimo, directing my attention to a request of December 23, 1907, for my opinion "as to whether

certain classes of employees variously designated as lock masters, lock keepers, lock helpers, lockmen, watchmen, firemen, enginemen, stokers, teamsters, etc., referred to in a memorandum of the Judge-Advocate-General, inclosed with Department's letter, could be legally excepted from the requirements of the eight-hour law (act of August 1, 1892; 27 Stat., 340) on the ground that they were neither laborers nor mechanics within the meaning of the act."

It seems from the inclosed memorandum that, at certain locks and dams, persons are employed whose duties are performed at irregular hours and do not require their attention for eight hours in the calendar day. These employees are liable to be called upon at any hour in the day for a service lasting but a few minutes; but, as a fact, the whole sum of the time in which they are engaged is but a fraction of eight hours. The rest of the day is entirely their own. The question is whether the service and employment of such persons, under such circumstances, is legal and proper within the limit and restriction of the statute.

As to laborers employed in a similar manner, I refer you to what was said by my predecessor, Attorney-General Moody (26 Op., 67):

"But I think that the eight-hour day means eight hours of effective labor, and therefore so far as your questions present the case of laborers and mechanics who, from the exigencies of the situation, must wait until after the completion of the regular day to finish their work, I am of the opinion that the blasting, cleaning of trucks, repair of machinery, and all other similar work essential to prompt and continuous service in the regular day may be legally done before and after the regular hours. To be more specific, laborers and mechanics who are called upon to do two hours' work, for example, before or after the regular day begins or ends have no just cause for complaint that the law is violated if they are only called upon to work six more hours during the regular hours. The law gives no countenance to the conception that the interval between the beginning and end of the regular day is a controlling convention which excludes labor at any other time and entitles workmen to stand around idle if their services can not be

fully availed of during that interval. The law limits the working day to eight hours, but it does not prescribe in what hours of the day the work shall be done. Practically, no doubt, there should be a real necessity, as is obviously the case here, for work during other hours than the regular day; and there should be scrutiny and care lest abuses arise which, however, the right of contract, subject to the law, between laborer and employer ought to prevent."

The cases mentioned in the memorandum of the Judge-Advocate-General come fully within these principles. Under the Cincinnati office are included locks on the Muskingum, Kentucky, and Big Sandy rivers. The employees live at the locks, in Government houses, and none is required to work an aggregate time in excess of eight hours though they are subject to call.

At Milwaukee are included 21 locks at canals of Fox River; the number of lockages averaging less than 2 per day and rarely exceeding 8 for the twenty-four hours.

At Louisville office are included locks of the Louisville and Portland Canal, and of the Green, Barren, Rough, and Wabash rivers. It is only occasionally that workmen are kept busy through eight hours of service. When traffic is light, actual service amounts to little more than being on hand.

At Nashville office are included locks where the lockmen are furnished quarters and none works more than three hours a day.

At Rock Island office are included locks where men do less than eight hours' work, the lockages averaging four a day. The men live in Government quarters and are required to be subject to duty from sixteen to twenty-four hours.

At Montgomery office are included locks where men have less than one hour effective work in a day and live on Government premises.

At Mobile office are included locks in Black Warrior River where lockages average less than 2 a day and the hours of work much less than eight.

At Little Rock office, lock where lockages average less than one a day.

In these cases to require that a sufficient number of men should be employed to prevent any of them from being liable to duty except within a determined and arbitrary period of eight continuous hours would be to put an unreasonable construction upon the statute. It would recognize a favored condition of employment not intended by by the law.

A familiar rule is, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided, if another and more reasonable interpretation is present in the statute.

Other instances mentioned in the memorandum are upon different footing. At places under the control of the *Pittsburg office* men are sometimes required to work more than eight hours "when dam is being raised or lowered;" and the service is one "requiring skill and training and could not safely be entrusted to inexperienced men." This does not make a case of extraordinary emergency. The act includes skilled as well as unskilled workmen. The need is for more men; not for the employment during more hours.

At other places, employees are classed as watchmen, dam tenders, custodians, etc. With respect to the legal status of such employees under the eight-hour law, it is impossible to speak with certainty without very full information as to the nature of their employment. I respectfully refer you on this subject to what is said in my letter of the 7th instant.

In this view I have expressed my opinion upon the construction of the act to meet what I deem to be the object of your inquiry.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

ATTORNEY-GENERAL—OPINIONS—COMPTROLLER OF THE TREASURY.

The question of law upon which the opinion of the Attorney-General is desired must not only be one actually arising in the administration of the Department preferring the request, and not hypothetical, but the facts upon which it arises must be found and definitely stated in the request, and not left for the Attorney-General to extract from the papers submitted. The question of law also must be clearly and definitely formulated.

Generally speaking, the decision of the Comptroller of the Treasury is conclusive in cases involving the application of an appropriation and the expenditure of public moneys, and governs the auditing officers and himself in passing accounts under section 8 of the act of July 31, 1894 (28 Stat., 208).

However, when the disbursement is a question of general and great importance, and especially when the Comptroller, in advance of a decision by himself, requests that the matter be referred to the Attorney-General for opinion and states that he will be guided by such opinion, the question may properly be answered by the Attorney-General.

Rules stated in former opinions adhered to.

DEPARTMENT OF JUSTICE,
May 22, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of the 20th instant, with which you transmit certain correspondence between the Interior Department and the Comptroller of the Treasury, with a memorandum by the Assistant Attorney-General assigned to the Interior Department relative to that correspondence, which you observe relates to the applicability of a general appropriation of the Geological Survey for gauging streams to the island territories of Porto Rico and Hawaii, and you ask me to advise you at as early a date as convenient whether the appropriation " for general expenses of the Geological Survey," etc., is applicable to the Territory of Hawaii.

I am constrained to call your attention to the established and obviously necessary rule of this Department relative to opinions by the Attorney-General, which requires that a question of law shall not only be one actually arising in the administration of a Department and not hypothetical, but that the facts upon which it arises

shall be found and set forth by the head of the Department preferring the request for an opinion, and shall not be left to the Attorney-General to extract from various papers submitted, and that the question of law arising thereon shall be clearly and definitely formulated. (20 Op., 614; id, 703; 21 Op., 201; id., 506; 22 Op., 77; 23 Op., 472; 24 Op., 59.)

I have the honor, therefore, to return the papers to you, with the request that you will resubmit them under the required conditions.

But I must also call your attention to the fact that the decision of the Comptroller of the Treasury in cases involving the application of an appropriation and the expenditure of public moneys is prima facie final and conclusive, and in the majority of cases is found to be so upon full examination. Some of the limitations to the finality of that jurisdiction are expressed in an opinion of my predecessor, Mr. Moody, dated December 22, 1904 (25 Op., 301), but, generally speaking, the authority of the Comptroller to decide a question involving a payment to be made from the Treasury so as to govern the auditing officers and himself in passing on accounts under the eighth section of the act of July 31, 1894 (28 Stat., 162, 208), is complete, and in various instances my predecessors have declined to give an opinion upon a question of this nature. (21 Op., 178; id., 530; 22 Op., 581; 23 Op., 468; 24 Op., 553.) "On the other hand, although a disbursement may be involved, when a question is of general and great importance, and especially when the Comptroller, in advance of decision by himself, requests that the matter be referred to the Attorney-General, and states that the opinion of the Attorney-General will be followed by him, then it is the view of this Department that the question may properly be answered by the Attorney-General." (25 Op., 301, 303, citing 21 Op., 181; id., 224; id., 402.) In the present matter, thus informally presented, I can perceive no reason why the rule just quoted should not be followed by me, and accordingly, in addition to the formal statement of the facts and the question of law for which I have called, I have the honor to request a pres-

entation of your reasons for not accepting the opinion of the Comptroller of the Treasury and referring the matter to me.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE INTERIOR.

NATURALIZATION HEARINGS PRECEDING GENERAL ELECTIONS.

The proviso to section 6 of the naturalization act of June 29, 1906 (34 Stat., 598), forbidding the issuing of any certificate of naturalization by any court within thirty days preceding the holding of any general election within its jurisdiction, does not forbid hearings on petitions for naturalization within such time, but merely forbids the issuing of such certificates within that time.

An alien is not naturalized until the order divesting him of his former nationality and making him a citizen of the United States has been signed by a judge of a court having jurisdiction of such cases.

The evident purpose of Congress in requiring that final action in naturalization cases shall be had only on stated days to be fixed by a rule of the court and that in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting notice of such petition, was to prevent the granting of certificates of naturalization unless due notice is given to the United States and an opportunity afforded to oppose the application.

Where the rule day is fixed by order of the court and the United States attorney has an opportunity to be present and be heard, the judge may, in his discretion, adjourn the hearing to such time as may suit his convenience and the convenience of the parties to the case.

DEPARTMENT OF JUSTICE,

May 26, 1908.

SIR: I have the honor to acknowledge receipt of your letter of May 21, inclosing a copy of a letter addressed to the Division of Naturalization by the deputy clerk of the United States courts at Hammond, Ind., in which the request is made that you be advised whether hearings may be

had on October 20, 1908, on petitions for naturalization filed in the United States district court at the place hereinbefore mentioned, provided that the final order of the court is in no case entered until after the general election in November. The clerk also asks whether the October term of said court may be adjourned until after the November, 1908, election, and the petitions heard at such adjourned term.

In reply I have the honor to inform you that in my judgment the effect of the proviso to section 6 of the naturalization act of June 29, 1906, seems plain. It reads as follows:

"*Provided*, That no person shall be naturalized nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any general election within its territorial jurisdiction."

The act is silent as to when hearings may be had on petitions for naturalization, and merely forbids the issuing of certificates within thirty days of a general election. Clearly, an alien is not naturalized until the order divesting him of his former nationality and making him a citizen of the United States has been signed by a judge of a court having jurisdiction. I see no reason, therefore, why hearings may not be held on October 20 if the orders granting certificates of citizenship are not entered until after the general election.

As to your second query, I beg to say that, in my opinion, the object of the provision that final action shall be had only on stated days to be fixed by rule of the court, and that in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition (section 6), when taken in connection with the other sections of the act is sufficiently clear. The evident purpose of Congress was to prevent the granting of certificates of naturalization unless due notice was given the United States and an opportunity afforded to oppose the application. Where the rule day is fixed by order of the court and the United States attorney has an opportunity to be present and be heard, I see no reason why the judge may not, in his discretion, adjourn the hearing

until such time as may suit his convenience and the convenience of the parties to the case.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF COMMERCE AND LABOR.

COMMISSIONER TO FIVE CIVILIZED TRIBES—FREE REGISTRATION OF OFFICIAL MAIL MATTER.

The Commissioner to the Five Civilized Tribes is not entitled to free registration of outgoing official mail matter, under section 3 of the act of July 5, 1884 (23 Stat., 158).

DEPARTMENT OF JUSTICE,

May 27, 1908.

SIR: I have the honor to acknowledge receipt of your letter of April 14, in which my opinion is requested as to whether the Commissioner to the Five Civilized Tribes, whose office is at Muskogee, Okla., is entitled to free registration of outgoing mail matter under the provisions of section 3 of the act of July 5, 1884 (23 Stat., 158). In considering this question it will be well to review the legislation which has been enacted from time to time with a view to relieving the Government Departments, bureaus, and offices from payment of certain postal charges in transmitting mail matter relating to official business.

In 1877 (19 Stat., 335) Congress provided that letters and packets relating exclusively to Government business might be sent through the mails free of charge. This was qualified by a proviso which has been construed by several of my predecessors as limiting this franking privilege to the Executive Departments and bureaus thereof at the seat of Government. (15 Op., 262; 18 id., 49; 23 id., 316.) In 1879 (20 Stat., 362) this act was amplified by extending the privilege relating to transmission of mail matter to all mail passing between officers of the United States and the Executive Departments and other officers. It further applied these provisions to the Smithsonian Institution, and contained the proviso that it should not apply to pension

agents and other officers who received a fixed amount as compensation for services including expenses for postage.

The act of 1884 (23 Stat., 158) still further extended the franking privilege, and contained the proviso that "official mail matter of either the Executive Departments or the various offices thereof," or of "the Agricultural Department, or of the Public Printer, may be registered without the payment of any registry fee." A second proviso excepted pension and other agents receiving a fixed amount, including expenses of postage, from the benefit of the act.

The last act to which reference need be made is that of July 2, 1886 (24 Stat., 122), which extended the provisions of the act of 1884, by providing that that act should be applicable to "all official mail matter of agents for the payment of pensions."

It is to be borne in mind that the acts of 1884 and 1886 were passed some years after the opinion of Attorney-General Devens, above referred to (15 Op., 262), had been rendered.

I think that it must be assumed that Congress adopted this later legislation with a full knowledge of the limited meaning which had been given to the words "Executive Departments or bureaus thereof." If it had been intended to extend the privilege of free registration to all officers, that intent would have been explicitly expressed, as was done in the case of those entitled to the franking privilege.

I am therefore constrained to advise you that under existing legislation the Commissioner to the Five Civilized Tribes is not entitled to free registration of outgoing official mail matter.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE INTERIOR.

NAVAL OFFICERS—MATES—RETIREMENT OF MATE NEILSEN.

Mates in the Navy are officers within the meaning of section 11 of the navy personnel act of March 3, 1899 (30 Stat., 1007), and of the act of June 29, 1906 (34 Stat., 554); and Mate Neilson, who was erroneously retired in March, 1899, under section 17 of the navy personnel act, upon his own application and after thirty years' service, was entitled to retirement under section 11 of that act.

This retirement on the part of Neilson, by reason of the holding of the officers of the Government that he could not be retired as an officer under section 11 of the act of 1899, did not forfeit any legal right which he had to retirement under that section. His retirement should therefore be so corrected as to show a retirement under section 11, with the rank and retired pay of a warrant officer with twelve years' service, and from his original retirement.

In any event, Neilson is now entitled to be retired under the act of 1906 with the rank and retired pay of a warrant officer having twelve years' service, but such a retirement would be from the date of retirement and would deprive him, during the intervening years, of the increased pay to which he became entitled at the time of his retirement March 31, 1899.

DEPARTMENT OF JUSTICE,
June 5, 1908.

SIR: I have the honor to respond to the request contained in your note of May 26, 1908, for an opinion upon the case there stated, in substance as follows:

Mate Neilson, retired, served as an enlisted man in the Navy from January 22, 1862, to February 9, 1865, and from February 20, 1866, to October 4, 1869, and as a mate from March 29, 1870, until retired. He was retired March 31, 1899, under section 17 of the personnel act of March 3, 1899, upon his own application after thirty years' service. And the question which you submit is "whether * * * Mate Neilson is now entitled to advancement to the next higher grade under the provisions of section 11 of the personnel act or the act of June 29, 1906; and if so, as to the date from which he is entitled to such advancement."

It is assumed that by the above expression, "the next higher grade," is meant the rank and pay of the next higher grade, as such officers are not advanced in grade on their retirement.

Much of what is here involved is covered by the two opinions of this Department upon a similar subject, under dates of October 15, 1907 (*ante*, p. 434), and April 18, 1908 (*ante*, p. 600).

Following the ruling in *United States* v. *Fuller* (160 U. S., 593, 595), it was held in those opinions that mates in the Navy were officers, within the meaning of section 11 of the navy personnel act and of the act of June 29, 1906 (34 Stat., 554).

As mate Neilson was retired March 31, 1899, he should have been retired under the former section with the rank and three-fourths the sea pay of the next higher grade.

The Navy Department then held that Mate Neilson could not be retired under section 11 of that act, but was entitled to be retired as an enlisted man, under section 17 of that act, he having had more than thirty years of service in the Navy. And he was thus retired upon his own application and with the rank he then held and three-fourths of the pay he was receiving at retirement.

The question to be determined is as to the effect of this retirement upon the right of Mate Neilson to be now retired, as of some date, under section 11 of the personnel act or the act of June 29, 1906.

That act provides that "any officer of the Navy not above the grade of captain who served with credit * * * during the civil war * * * and who has heretofore been, or may hereafter be, retired * * * may, in the discretion of the President * * * be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement."

The higher grade thus referred to is that of warrant officer, and the retired pay of that grade was 75 per cent of the sea pay of the grade, varying in amounts by three-year period of service. (Act of March 3, 1873, 17 Stat., 547; and opinion of April 18, 1908, 26 Op., 600.)

Since the above act of June 29, 1906, embraces both officers who were then retired and those thereafter retired, Mate Neilson, if otherwise entitled, may be retired under that act notwithstanding his former retirement.

I do not think that the retirement of Mate Neilson under section 17 of the personnel act, upon his own application, is,

under the circumstances, a bar to his retirement as an officer under section 11 of that act or under the act of 1906.

The Government having held that he could not be retired as an officer under section 11, but might be, under section 17, upon his own application, I do not think that, by accepting this erroneous decision and acting upon it, he waived or forfeited any legal right which he had to be retired otherwise.

I am of opinion that, as Mate Neilson was entitled to be retired under section 11 of the act referred to, his retirement of March 31, 1899, should be so corrected as to make it show such a retirement and, following the above opinion of April 18, 1908, with the rank and retired pay of a warrant officer with twelve years of service, and from said original retirement. This is giving to this officer, although at a later date, that to which, in law, he was then entitled.

In any event Mate Neilson would be now, under the above opinion, entitled to be retired under the act of 1906 with the rank and retired pay of a warrant officer having twelve years' service. But, since the advancement in such case would be from the date of retirement, this would deprive him, during the intervening years, of the increased pay to which he became entitled at and from his retirement March 31, 1899.

As you inform me that there are on the retired list some other mates whose cases are essentially similar to this one, what is here said will apply to others also.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE NAVY.

ENLISTMENT IN THE NAVY—DESERTION—PARDON—REENLISTMENT.

A person who, having enlisted in the Navy, deserts therefrom and is convicted of desertion by a general court-martial and thereafter receives from the President a full and unconditional pardon for such offense and restoration to civil rights, may be permitted to reenlist in the Navy notwithstanding the provisions of section 1420, Revised Statutes.

The effect of a pardon is to obliterate the offense and make him who had been an offender as innocent, in legal contemplation, as if he had never offended, to remove all disabilities incident to the offense charged, and to restore to him all civil rights which he would have had if he had not offended, so far, at least, as it is in the power of the Government to make it so.

DEPARTMENT OF JUSTICE,
June 16, 1908.

SIR: I have the honor to respond to your request expressed in the note of your Secretary of June 8, 1908, for an opinion whether Frank Calbert Arnold can be permitted to reenlist in the Navy, after his conviction and pardon for desertion therefrom.

It appears that this man enlisted in the Navy at Chicago, Ill., on October 7, 1901, for a period of four years. He deserted from the *Hopkins* at Philadelphia, May 29, 1905, at which time he held the rating of yeoman, first class. He surrendered himself June 21, 1906, and was convicted July 10, 1906, of desertion by a general court-martial, duly approved, and sentenced to be reduced to the rating of landsman and to be confined for one year, and to be then dishonorably discharged from the Navy.

After serving the term of confinement imposed, and on May 22, 1908, he received and accepted from the President a full and unconditional pardon for his offense and restoration to civil rights, and now desires to reenlist in the Navy, and to redeem himself from the odium of his former desertion. And the Navy Department is willing that he should reenlist, if it can be done consistently with existing law, and your question is, in substance, whether this can be done.

The answer to this question involves a consideration of section 1420, Revised Statutes, and of the effect of the President's pardon.

The section referred to is as follows:

"No minor under the age of sixteen years, no insane and intoxicated person, and no deserter from the naval or military service of the United States shall be enlisted in the naval service."

This is of course a bar to the reenlistment of the man Arnold if, in legal contemplation, he is a deserter, and this depends upon the effect of the President's pardon.

The Supreme Court has in several cases stated the purpose, office, and effect of a pardon so plainly and completely that we need not go elsewhere for authorities, or, in order to answer the question submitted, look any further. And from this it will be seen that the effect of a pardon is to obliterate the offense and make him who had been an offender as innocent, in legal contemplation, as if he had never offended, to remove all disabilities incident to the offense charged, and to restore to him all civil rights which he would have had if he had not offended.

This is so, as far as it is in the power of the Government to make it so. But this power has its limitations. It can not and does not restore that which is already lost and gone beyond the reach of the Government. But as to the future, it relieves the person from all disabilities and consequences to which he would be subject but for the pardon, so that thereafter nothing can be imputed to him based upon the allegation of his offense. Nothing short of this, nothing that partially pardons or removes only some of the disabilities and not all, can be a pardon in its full sense.

In *Ex parte Garland* (4 Wall., 333) an act of Congress had provided that no one should be permitted to practice in the Supreme Court or other courts of the United States except upon taking a certain expurgatory oath that he had not given aid or countenance to the rebellion, etc., and one question was as to the effect of the President's pardon in removing this disability. What the court said, page 380, so completely covers the whole ground that it is quoted here at length:

"Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never com-

mitted the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

"There is only this limitation to its operation: It does not restore offices forfeited or property or interest vested in others in consequence of the conviction and judgment.

"The pardon produced by the petitioner is a full pardon 'for all offenses by him committed, arising from the participation, direct or implied, in the Rebellion,' and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offense of treason committed by his participation in the Rebellion. So far as that offense is concerned he is thus placed beyond the reach of punishment of any kind."

That is precisely the effect of a pardon. "In the eye of the law the offender is as innocent as if he had never committed the offense."

This precise point is reaffirmed in *United States* v. *Padelford* (9 Wall., 531, 537).

In *Osborn* v. *United States* (91 U. S., 474) the court says, on page 477:

"The pardon of that offense necessarily carried with it the release of the penalty attached to its commission, so far as such release was in the power of the Government, unless specially restrained by exceptions embraced in the instrument itself. It is of the very essence of a pardon that it releases the offender from the consequences of his offense. If in the proceedings to establish his culpability and enforce the penalty, and before the grant of the pardon, the rights of others than the Government have vested, those rights can not be impaired by the pardon. The Government having parted with its power over such rights, they necessarily remain as they existed previously to the grant of the pardon. The Government can only release what it holds."

In *Carlisle* v. *United States* (16 Wall., 147) the court says, page 151:

"There has been some difference of opinion among the members of the court as to cases covered by the pardon of the President, but there has been none as to the effect and operation of a pardon in cases where it applies. All have agreed that the pardon not merely releases the offender from the punishment prescribed for the offense, but that it obliterates in legal contemplation the offense itself."

And in *Knote* v. *United States* (95 U. S., 149) the court says, page 153:

"A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable, and within control of the pardoning power or of officers under its direction. It releases the offender from all disabilities imposed by the offense and restores to him all his civil rights. In contemplation of law, it so far blots out the offense that afterwards it can not be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the Government any obligation to give it. The offense being established by judicial proceedings that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offense or which have been acquired by others whilst that judgment was in force."

It is useless to pursue the subject further. By this pardon the offense of the man Arnold is obliterated, and he is, in legal contemplation, no longer a deserter. His disabilities are removed and, among them, that relating to

re-enlistment in the naval or military service of the United States. And he is restored to his civil rights, including that of enlistment in such service, and it is quite within the province of the Navy Department to permit his re-enlistment.

Respectfully,

CHARLES J. BONAPARTE.

The PRESIDENT.

EIGHT-HOUR LAW—WATCHMAN AT CORREGIDOR ISLAND.

A watchman employed at Corregidor Island, Philippine Islands, whose duties are "to supervise all arrivals and to see that no one lands on the island without authority; to investigate such matters as the absence from work of native employees; and to make report of those matters," is not a laborer or mechanic within the meaning of the eight-hour law. Such duties pertain more to those of a clerk or superintendent of laborers than to those of a laborer or mechanic.

DEPARTMENT OF JUSTICE,
June 17, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of May 28, 1908, inquiring whether a watchman employed at Corregidor Island, Philippine Islands, falls within the designation of a laborer or mechanic within the meaning of the eight-hour law. The duties of this employee are "to supervise all arrivals and to see that no one lands on the island without authority; to investigate such matters as the absence from work of native employees, and to make reports of these matters."

I think these services pertain more to those of a clerk or superintendent of laborers and do not bring the person within the class of laborers or mechanics.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

EIGHT-HOUR LAW—WATCHMAN, LABORER, HOSTLER, AND MESSENGER IN WAR DEPARTMENT.

A watchman, "whose duty is to watch the entrance of one of the public buildings occupied by the War Department, executing instructions with regard to admitting persons into the building and permitting public property to be taken out of the building, reporting to his chief any violation of law, disturbance of the peace, etc., that may be brought to his attention, or to guard the building and property therein during the night," is not a laborer or mechanic within the meaning of the eight-hour law.

A laborer, "whose duty is to perform manual labor in the removal of furniture and office fixtures, cutting grass, washing floors and windows, and general office cleaning," is not a laborer within the meaning of the eight-hour law; such services being more those of a domestic servant than those of a laborer in the usual meaning of the term.

A hostler, "whose duty is to feed, drive, and care for horses, and to clean carriages, harness, and stables," is rather a domestic servant than a laborer within the meaning of the eight-hour law.

A messenger, "whose duty is to sweep floors and do general office cleaning, attend to fires, and carry messages," is not a laborer or mechanic within the meaning of the eight-hour law.

DEPARTMENT OF JUSTICE,
June 17, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of May 21, 1908, requesting my opinion whether certain employees, whose respective duties are described and who are stationed in Washington, D. C., are subject to the eight-hour law.

1. I am of opinion that "a watchman, whose duty is to watch the entrance of one of the public buildings occupied by the War Department, executing instructions with regard to admitting persons into the building and permitting public property to be taken out of the building, reporting to his chief any violation of law, disturbance of the peace, etc., that may be brought to his attention, or to guard the building and property therein during the night," is not either a laborer or mechanic within the meaning of the eight-hour law.

2. I am of opinion that "a laborer, whose duty is to perform manual labor in the removal of furniture and office

fixtures, cutting grass, washing floors and windows, and general office cleaning," is not a laborer within the meaning of the eight-hour law. The services required seem to be more those of a domestic servant than those of a laborer in the usual meaning of the term.

3. I am of opinion that a hostler, "whose duty is to feed, drive, and care for horses, and to clean carriages, harness, and stables," is rather a domestic servant than a laborer within the meaning of the eight-hour law, and therefore not subject to the provisions of that law.

4. I am of opinion that a "messenger, whose duty is to sweep floors and do general office cleaning, attend to fires, and carry messages," is not a laborer or mechanic within the meaning of the eight-hour law.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF WAR.

IMMIGRATION LAWS—REMISSION OF FINES—SECRETARY OF COMMERCE AND LABOR.

The Secretary of Commerce and Labor has no power to remit a fine imposed by a United States court upon a steamship company for its failure to detain and return to the country whence they came, aliens whose deportation has been ordered under section 10 of the immigration act of March 3, 1891 (26 Stat., 1084).

Opinion of Attorney-General Olney (20 Op., 705) and of Attorney-General Griggs (23 Op., 271) concurred in.

DEPARTMENT OF JUSTICE,

June 19, 1908.

SIR: Your letter of June 2 advises me that the Pacific Mail Steamship Company, through their agents at Honolulu, Hawaiian Islands, Messrs. H. Hackfeld & Co. (Limited), paid certain fines with costs, amounting in the aggregate to $1,001.34, in the year 1902, which were imposed by the United States District Court for Hawaii as the result of proceedings against the said company and their agents for failure to detain and return to the country whence they came three Japanese aliens whose deportation had been or-

dered, under section 10 of the act of March 3, 1891 (26 Stat., 1084), amending previous laws relative to immigration and the importation of alien contract labor. That section provides:

"* * * and if any master, agent, consignee, or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, such master * * * shall be deemed guilty of a misdemeanor, and shall be punished by a fine not less than three hundred dollars for each and every offense; * * *."

You also state that an application has now been made to you for the remission of these fines, upon the ground that the jury were instructed that they could not consider any attempt of the defendant company to prove due care on its part to prevent the escape of these immigrants, and upon the ground that the Supreme Court in *Hackfeld & Company* v. *United States* (197 U. S., 442) dealing with the statute in question, has held that:

"This statute imports a duty, but in the absence of a requirement that it shall be performed at all hazards, we think no more ought to be required than a faithful and careful effort to carry out the duty imposed."

You state that you are led to believe, if the defendant had been permitted to introduce evidence showing the actual precautions taken to detain the immigrants and prevent their escape, the verdict would have been found for the defendant, particularly in view of the manifest good faith shown by the latter.

Under these circumstances and in accordance with the desire of the applicant's attorney, you request my opinion as to whether you have authority to remit the fines in question.

I am of opinion that you have not. Laying aside the fact that the fines were imposed in pursuance of judgment upon a verdict of conviction in a criminal or quasi-criminal prosecution, and were covered into the Treasury at least

three years before the decision in the *Hackfeld* case changed the previous executive construction of the law in question, the question of your authority to remit similar fines incurred and imposed under the immigration laws has been examined by two of my predecessors and answered in the negative.

In 20 Op., 705, the precise point was considered by Mr. Olney with reference to the same section of the act of 1891, and it was held that the provisions of section 3469 of the Revised Statutes for the compromise of Government claims have no application to the case of a fine such as this, and those of sections 5292, 5293, 5294 relate only to certain limited classes of cases, Mr. Olney's conclusion being (p. 709): "The case of a fine or penalty incurred for violation of the provisions of the alien immigration law does not therefore, in my judgment, fall within the purview of the statutes embraced under Title LXVIII."

In 23 Op., 271, Mr. Griggs re-examined the question relative to the same provision of law, and approved Mr. Olney's opinion, saying (pp. 273, 276):

"The fact that it might be equitable or desirable to include in the power of remission, under existing laws relative to this power, new cases not contemplated when those laws were adopted, can not overcome and enlarge the defined and restricted language and application of the law. The alien immigration laws have all been passed since the sections of the Revised Statutes which we are considering became law.

"It therefore seems to me that the case of a remission of a fine under the immigration laws is unprovided for; it is a *casus omissus*, and I concur in the views upon the subject expressed by Mr. Olney in 20 Opinions, 705."

It is true that in that opinion Mr. Griggs anticipated the legal view which the Supreme Court afterwards took of the meaning of the statute and the responsibility of the owners and masters of vessels thereunder, and because there had been no legal proceedings in that particular case and no fine had been imposed, although the necessary amount thereof had been voluntarily deposited by the agents of the vessel owners, he suggested that the return of the money

deposited, there being no guilt and no lack of good faith, would be, not the remission of a fine or penalty, but the restitution of an amount to which the Government was never justly entitled. But that is not this case, and, for the reasons above set forth, I have the honor to advise you that I concur in the reasoning and conclusion of my predecessors, and that, in my opinion, you have no authority to remit the fines in question. I may add that the later immigration laws have not changed the state of the existing law or enlarged your power in this respect.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF COMMERCE AND LABOR.

SECOND DEPUTY COMPTROLLER OF THE CURRENCY—APPOINTMENT.

The Secretary of the Treasury has no power, under section 169, Revised Statutes, to appoint a person to fill the office of Second Deputy Comptroller of the Currency created by the act of May 22, 1908 (35 Stat., 203), no such authority being expressly granted in the act creating that office.

The general rule deducible from Article II, section 2, clause 2, of the Constitution is that in the absence of an express enactment to the contrary, the appointment of any officer of the United States belongs to the President by and with the advice and consent of the Senate.

The Second Deputy Comptroller will have power to perform all the duties of the Comptroller and First Deputy Comptroller of the Currency in the absence or disability of those officers.

The Secretary of the Treasury, upon the request of the Comptroller of the Currency and with the approval of the President, may require the Second Deputy Comptroller to execute a voluntary bond in such penalty as may to him seem adequate to protect the public interests.

DEPARTMENT OF JUSTICE,
June 19, 1908.

SIR: I have the honor to acknowledge the receipt of your letter of June 17, with its inclosures, in which you state that the general appropriation act approved May 22, 1908 (35 Stat., 203), appropriates "for Comptroller of the Currency,

five thousand dollars; for Deputy Comptroller, three thousand five hundred dollars; Deputy Comptroller, three thousand dollars;" and (the appropriation for the Deputy Comptroller at $3,000 being a new provision in the law) you refer to this so-called "Second Deputy Comptroller" and to the importance of the appointment of this officer, and request my opinion on the following points:

"First. Whether the Secretary of the Treasury has power to appoint this Second Deputy, under authority of section 169 of the Revised Statutes, and to require a bond.

"Second. If appointed by the Secretary of the Treasury would the Second Deputy be empowered to perform the duties of the Comptroller in the absence or inability of that officer and the First Deputy, as provided by section 327 of the Revised Statutes, in the case of the present Deputy Comptroller.

"Third. If you are of the opinion that the Secretary of the Treasury can, under authority of section 169 of the Revised Statutes, appoint the Second Deputy Comptroller, but that such appointment would not empower that officer to act as Comptroller in the absence of the latter, should the appointment be made by the President and would such appointment confer upon the Second Deputy Comptroller such powers."

Section 169, Revised Statutes, simply authorizes the head of a Department to employ "such number of clerks" and other subordinate employees "as may be appropriated for by Congress from year to year." I do not think that this provision authorizes you to appoint the Deputy Comptroller in this case, who is not a clerk and is manifestly an officer of the United States.

"The officer is distinguished from the employee in the greater importance, dignity, and independence of his position; in being required to take an official oath and perhaps to give an official bond." (*Throop* v. *Langdon*, 40 Mich., 683, cited in *Baltimore City* v. *Lyman*, 92 Md., 591.)

By Article II, section 2, clause 2 of the Constitution, the President "shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court,

and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments." The general rule deducible from this provision is that, in the absence of an express enactment to the contrary, the appointment of any officer of the United States belongs to the President by and with the advice and consent of the Senate. (6 Op., 1; 15 Op., 3, 449; 17 Op., 532; 18 Op., 98, 298.)

The power of Congress in the concluding portion of the provision quoted was exercised, for example, in the act of June 3, 1864, section 1 (13 Stat., 99), from which section 327, Revised Statutes, was drawn, by providing that—

"There shall be in the Bureau of the Comptroller of the Currency a Deputy Comptroller of the Currency, to be appointed by the Secretary, who shall be entitled to a salary of two thousand five hundred dollars a year, and who shall possess the power and perform the duties attached by law to the office of Comptroller during a vacancy in the office or during the absence or inability of the Comptroller. The Deputy Comptroller shall also take the oath of office prescribed by the Constitution and laws of the United States, and shall give a like bond in the penalty of fifty thousand dollars."

Thus the law expressly makes provision for the appointment of the Deputy Comptroller, who has now become, as a matter of convenient designation, the First Deputy Comptroller, and whom you so call, and defines his power and duties by reference to the Comptroller's power and duties. But there is no such provision with respect to the new so-called Second Deputy Comptroller, however anomalous the relations and consequences due to this difference may be. I am clearly of the opinion that you do not possess the power to appoint this Second Deputy, and that the power is lodged in the President.

This answer to your first question renders an answer to your second question unnecessary; and as to the third question, the only remaining point is whether, the power

of appointment being lodged in the President, such appointment would confer upon the appointee the authority to perform the duties of the Comptroller in the absence or inability of that officer and the First Deputy by analogy with the provisions of section 327 as to the present Deputy Comptroller.

A similar question was presented under the act of March 3, 1901 (31 Stat., 960), by which Congress created the office of a Deputy Assistant Treasurer of the United States merely by an appropriation as in the present case, without prescribing the duties of that officer and without directing by whom he should be appointed. It was held by the Solicitor of the Treasury, following the opinions of the Attorneys-General above cited, that the appointment must be made by the President by and with the advice and consent of the Senate; and it was further held that the words "Deputy Assistant Treasurer" necessarily imply a power to perform all the duties which might be performed by the Assistant Treasurer, and since the Assistant Treasurer was authorized to perform such duties as the Treasurer might assign to him, it necessarily followed that the Deputy Assistant was authorized to act in the Treasurer's place and discharge such duties as might thus be required of him. I am of opinion that the Solicitor of the Treasury took the right view of this matter, and that this view rules the present case. Generally speaking, a deputy has power to do every act which his principal may do, and is not restrained to some particulars of his office. (Throop on Public Officers, sec. 583; Mechem on Public Officers, sec. 570; *Erwin* v. *United States*, 37 Fed. Rep., 470.) Doubtless it was on account of this general rule and with the intention that there should be no restriction that Congress did not deem it necessary to prescribe specifically the duties of the additional Deputy Comptroller. There being no limitation or restriction upon the power of this officer, my opinion is that he would have the same authority as that conferred by statute upon the First Deputy.

As to the matter of the bond referred to in your first inquiry, I have the honor to advise you that upon the re-

quest of the Comptroller of the Currency, with the approval of the President, you may, in your discretion, require the Second Deputy Comptroller to execute a voluntary bond in such penalty as you may deem adequate to protect the public interests.

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

AMERICAN FISHING VESSEL—COST OF TRANSPORTATION TO UNITED STATES OF DESTITUTE CREW.

The crew of an American fishing vessel are seamen within the meaning of section 4577, Revised Statutes; and the cost of transportation to the United States of the destitute crew of such a vessel, furnished by a United States consul, is a proper charge against the appropriation for the "relief and protection of American seamen in foreign countries."

Where the destitution of the crew has resulted from the vessel owner's fault or misconduct, and that fact has been established, there would seem to be a right of recovery in the United States upon general principles of law for the cost of subsistence and transportation furnished under the statute.

The question whether a suit by the Government to enforce recovery from the vessel owners of the expense thus expended would be successful, is speculative and hypothetical and beyond the power and functions of the Attorney-General under the statutes to answer. The question of the actual liability of the vessel owners is judicial in its nature and must be determined by the courts.

DEPARTMENT OF JUSTICE,

June 20, 1908.

SIR: Your letter of June 15 informs me that the American fishing schooner *Francis Cutting* has been seized by the Canadian cruiser *Kestrell* for illegal fishing, and is now held by the authorities at Vancouver; that, at the request of the owners of the schooner, the American consul at Vancouver sent the crew to this country as destitute American seamen; and, at the suggestion of the Comptroller of the Treasury, who holds that the cost of transportation of the seamen to this country is a proper charge against the Government, you submit for my opinion the question whether

the owners of the vessel should refund to the Government the amount expended for the transportation of the seamen.

Section 4577, Revised Statutes, provides:

"It shall be the duty of the consuls, vice consuls, commercial agents, and vice commercial agents, from time to time, to provide for the seamen of the United States who may be found destitute within their districts, respectively, sufficient subsistence and passages to some port in the United States in the most reasonable manner, at the expense of the United States, subject to such instructions as the Secretary of State shall give. The seamen shall, if able, be bound to do duty on board the vessels in which they may be transported, according to their several abilities."

For the purposes of this section Congress annually appropriates for the "relief and protection of American seamen in foreign countries" (e. g., act of February 22, 1907, 34 Stat., 916, 925).

Are the members of the crew of an American fishing vessel "seamen of the United States," and were they "destitute" in this case? The statute is to receive a liberal construction. (Bowler's First Comp. Dec., 314.) The word "vessel" is regarded as including a fishing vessel. (*The Minna*, 11 Fed. Rep., 759; *The Ocean Spray*, Fed. Cas., No. 10412; and see also *Saylor* v. *Taylor*, 77 Fed. Rep., 476.) Section 4612, Revised Statutes, provides that every person, excepting apprentices employed or engaged to serve in any capacity on board any vessel belonging to any citizen of the United States, shall be deemed to be a "seaman." Accordingly, fishermen have been held to be seamen, and are protected as are other seamen. (*The Carrier Dove*, 97 Fed. Rep., 111; *Knight* v. *Parsons*, 1 Spr., 279; 8 Comp. Dec., 545.) As an analogy, it may be stated that the Supreme Court has held that the members of the crew of a tug and of dredging barges associated with the tug in the work of channel dredging under the river and harbor acts, including those performing mechanical and manual labor not related to the navigation of a vessel, are to be considered as seamen and not laborers or mechanics. (*Ellis* v. *United States*, 206 U. S., 246, 260.)

The act of December 21, 1898 (30 Stat., 755), related to American seamen, and was enacted for the protection of

such seamen, and amended various sections of the statutes on the subject of relief and protection of seamen, excepting, however, from the operation and effect of certain of those statutes fishing or sailing vessels or yachts, but left section 4577 unamended and not subject to the restriction just stated, from which it is to be necessarily inferred that Congress did not intend to prohibit the crews of such vessels from being regarded as seamen, as theretofore considered by the courts and accounting officers, and entitled to relief.

Paragraph 202 of the Consular Regulations of 1896 of your Department provides that American seamen engaged on fishing vessels are to be regarded in the same relation as seamen on other vessels to the laws in respect to discharge, etc., *relief* and *transportation;* and paragraph 267 instructs consular officers to relieve destitute American seamen without reference to the fault or misfortune by which they became destitute, except so as to encourage desertion.

I have no hesitation in concluding that the crew of an American fishing vessel are seamen within the meaning of section 4577.

As to the question of destitution, the consul finds that status as a fact; in the absence of fraud, that finding is conclusive (3 Comp. Dec., 40). I hold, therefore, that the cost of transportation furnished by the consul is a proper charge against the appropriation for the "relief and protection of American seamen in foreign countries."

As to the liability of the vessel owners to reimburse the United States for the cost of the transportation on the ground that the destitution of the seamen was the result of the alleged illegal fishing or other wrongful act on the part of the vessel owners, the scheme and scope of the entire body of statutes which we have just been considering would seem necessarily to contemplate various cases and contingencies in which American seamen were stranded in a foreign country and had become destitute through no fault of their own and through the fault or wrong of the owners of the vessels on which they had shipped; and yet the laws and statutes do not specifically create a liability on the part of vessel owners in such cases to reimburse the United States. Nevertheless, *ex æquo et bono*, where the

destitution has resulted from the vessel owner's fault or misconduct, and that fact has been established, I think there would be a right of recovery in the United States upon general principles of law for the cost of subsistence and transportation furnished under the statute. A request by the vessel owners for such transportation, as in this case and under such circumstances, would tend to show good faith and a proper regard for the rights and welfare of the seamen employed by them, and the guilt of a vessel owner or responsibility for violation of the law, as charged here, is not, of course, to be assumed. I think I have indicated enough on this point to show that, in my opinion, until a vessel owner's liability for such an offense, from which the seamen's destitution flows, has been established, the cost of subsistence and transportation should not be charged against him, and that in case he is held liable on such charge of violating treaty obligations or international or foreign municipal law, then it will be proper to present to him an account of the cost of transportation, etc., of destitute seamen, especially when he has requested their return to this country as such; and if the claim is not voluntarily recognized, then it will be proper to bring suit for the recovery of the amount thereof on the ground of a common-law liability, as on an implied assumpsit or as for money paid on another's account. In the present case, of course, no such action is to be taken until and unless the charge of illegal fishing is finally established in the proper tribunals.

Whether a suit by the Government to enforce recovery from the vessel owners would probably be successful, which subordinate query is implied in your question, is of course beyond my power to answer and my functions in this respect under the statutes. That query is speculative and hypothetical, and the fundamental question of the actual liability of the vessel owners is altogether judicial in its nature and must be determined by the courts. (19 Op., 670; 20 Op., 539, 702; 22 Op., 181; 24 Op., 69; 25 Op., 97.)

Very respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE TREASURY.

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2. **Same.—Such a regulation would be valid only in so far as State and local authorities acquiesced** in its observance. In so far as the regulations undertook to invalidate action which it is now competent for State and local authorities to take, and to exclude the States from any participation in the initial process of bringing volunteers into the service, they would be nugatory and might be disregarded. *Ib.*
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2. **The Attorney-General can not properly review a record and memorandum submitted**, and render his opinion, based upon facts deduced therefrom, as to the correctness of a proposed action of the Secretary of Commerce and Labor in the matter of the appeal of Geronimo Garcia, an alien who was excluded from the United States by the decision of the board of special inquiry at the port of New Orleans. 378.
3. **Question of Law Must be Specifically Formulated and Accompanied by a Statement of Facts.**—It has been the invariable rule of the Department to decline to give an opinion upon any question of law unless it is "specifically formulated" and "accompanied by a statement or finding of the facts involved." (23 Op., 330; 23 Op., 473; 24 Op., 59; 24 Op., 102.) *Ib.*
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CIVIL SERVICE.

1. **Scope of Civil-Service Law as Regards Classification.—Congress undoubtedly intended** that the provisions of the civil-service law, so far as these provided for the organization of a classified service, should be extended to all persons engaged in the legitimate civil work of the executive branch of the Government, whether such persons were or were not technically in the employ of the United States. 363.
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7. **Same.—The purpose of section 4 of the act of August 5, 1882,** was to prevent the expenditure of public money in the employment of subordinate persons at the seat of government out of appropriations made for general purposes, so as to insure the efficient control by the Congress not only over the amounts of money expended, but also over the number

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and character of subordinate officers and employees in the service of the United States employed at the seat of government. *Ib.*

8. **Same.—The act of August 5, 1882, in no wise limits the discretion of the heads of the several Executive Departments as to the character of the work** which shall be required of their several employees, but is intended to prevent the employment of subordinate officers or employees at the seat of government without specific appropriations for their payment. *Ib.*

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13. **Eligibility—Members of the Same Family.—The Civil Service Commission can not refuse to examine** an applicant upon the ground that he may subsequently be disqualified for appointment under section 9 of the civil-service act of January 16, 1883 (22 Stat., 406), but it may inform persons to whom appointments could not be tendered at the time of

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17. **Children who have established and maintain separate homes** apart from their parents are no longer members of the same family as their parents within the meaning of section 9 of the civil-service act of January 16, 1883 (22 Stat., 406). *Ib.*

18. **Appointment.—The temporary force of employees, to be selected and employed by Secretary of the Interior,** as provided in the act of June 22, 1906 (34 Stat., 429, 430), for the reproduction of the records and files of the offices of surveyor-general and register and receiver of the land office at San Francisco, Cal., which were destroyed by the earthquake and fire, and the persons to be *selected* by the Secretary of the Interior, under the act of March 4, 1907 (34 Stat., 1333), to make transcripts of records and plats in the General Land Office, must be appointed as a result of open competitive examinations, held under the provisions of the civil-service law. 502.

19. **What Positions Require Competitive Examinations.**—Under the existing civil service rules, all places in the executive civil service, except those mentioned in Schedule "A" and except persons employed merely as laborers and persons whose appointments are subject to confirmation by the Senate, must be appointed as a result of open competitive examinations, held under the provisions of law. *Ib.*

20. **Congress may at any time it deems proper exempt any position** or any class of positions from the operation of the civil service act, but to do this it must use language indicating clearly and affirmatively its intention to do so. *Ib.*

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21. **Where Congress in an appropriation act makes use of the very term employed in the civil-service act** in describing appointments to be made in accordance with its provisions, it is manifest that there was no intention to waive the requirements of the civil-service law. *Ib.*

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CONDUIT ROAD, MARYLAND.

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2. **Same.—Congress has the right of exclusive jurisdiction over the entire length of the Conduit road,** provided the roadbed is owned in fee by the United States and has been acquired in accordance with the consent of the legislature of the State of Maryland contained in the act of May 3, 1853 (Laws of Md., 1853, ch. 179). *Ib.*
3. **Same.—The provisions in Article I, section 8, of the Constitution,** that Congress shall have power to exercise exclusive legislation in all cases whatsoever over the District of Columbia and "all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and *other needful buildings*," contemplates the purchase of land "needful," for any reason, to the discharge of any of the constitutional duties or the exercise of any of the constitutional powers of the United States. *Ib.*
4. **Same.—The reservoirs, aqueducts, and other constructions appurtenant to the water supply of the city of Washington, D. C.,** are to be considered "needful buildings" within the meaning of Article I, section 8, of the Constitution, and since a roadway is an appropriate and necessary appurtenance to such works, the Conduit road constitues territory within the exclusive jurisdiction of Congress. *Ib.*
5. **Same.—The Conduit road is not a public highway, but is subject to the control of the Chief of Engineers** (section 1800, Revised Statutes), and its use by the public may be subjected to such regulations as may be appropriate, obedience to which may be secured by the use of such reasonably sufficient force as the Secretary of War may deem advisable. *Ib.*

CONGRESS.

1. **Scope of Civil-Service Act as Regards Classification.—Congress undoubtedly intended** that the provisions of the civil-service law, so far as these provided for the organization of a classified service, should be extended to all persons engaged in the legitimate civil work of the executive branch of the Government, whether such persons were or were not technically in the employ of the United States. 363.
2. **Exemption of Positions from Operation of Civil-Service Act.**—Congress may at any time it deems proper exempt any position or any class of positions from the operation of the

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civil-service act, but to do this it must use language indicating clearly and affirmatively its intention to do so. 502.

3. **Congress may prescribe qualifications for office and require** that appointments shall be made from among those who have shown by proper tests to have those qualifications. *Ib.*
4. **Where Congress in an appropriation act makes use of the very term employed in the civil-service act** in describing appointments to be made in accordance with its provisions, it is manifest that there was no intention to waive the requirements of the civil-service law. *Ib.*
5. **Restrictions upon Employment by Officers of the United States of Servants to Assist Them.**—Congress may place any restrictions it pleases upon the employment, by officers of the United States, of any kind of servants to assist them in the discharge of their duties. 363.
6. **Congressmen and Senators—Eligibility to Civil Office.**—A member of either House of Congress is eligible to be appointed to any other office not forbidden to him by law, the duties of which are not incompatible with those of a Member of Congress. 457.
7. **Same.—The question as to whether a Congressman can be appointed a member of the Board of Managers of the Soldiers' Home,** and become local manager of one of the homes, is wholly a matter for the decision of Congress itself. (Section 4826, Rev. Stat.) *Ib.*
8. **Same.—There is no constitutional objection** to the election of a Member of Congress as a member of the Board of Managers of the National Home for Disabled Volunteers, although such an election would seem to be contrary to sound public policy. *Ib.*
9. **Same.**—Under other circumstances than those which thus involve the entire control of the Congress over a position established and filled by itself, the holding of a visitorial and an administrative office by the same person would be regarded as legally incompatible. *Ib.*
10. **Admission of Aliens—State Agents.**—The right of Congress to regulate the admission of aliens into the United States clearly controls the action of any State agent in this respect. 180, 411.

CONTRACTS ENTERED INTO BY MEMBERS OF CONGRESS. *See* CONTRACTS, 7.

LEGISLATION NEEDED TO PROTECT SUBMARINE CABLES. *See* SHIPPING, 3.

POWER TO MODIFY AGREEMENTS WITH INDIANS. *See* INDIANS, 26.

RIGHT TO REGULATE IMMIGRATION. *See* IMMIGRATION, 7, 27.

CONSERVATION CHARGE. *See* RESERVATIONS, 7.

CONSTANTINOPLE. *See* PUBLIC BUILDINGS, 4.

CONSTITUTION.

1. **Appointment—President.—The general rule deducible from Article II, section 2, clause 2,** of the Constitution is that in the absence of an express enactment to the contrary, the appointment of any officer of the United States belongs to the President by and with the advice and consent of the Senate. 627.
2. **Recess Appointments.—The words "may happen," in Article II, section 2, clause 3,** of the Constitution, mean "may happen to exist." Therefore the President has power whenever and however a vacancy first occurred, whether by death, resignation, etc., or by the creation of a new office by act of Congress, which is an "original vacancy," to fill the place during the recess of the Senate by a temporary appointment under a commission which shall expire at the end of the next session of the Senate. 234.
3. **Purchase of Land "Needful" for Governmental Purposes.—The provisions in Article I, section 8,** of the Constitution, that Congress shall have power to exercise exclusive legislation in all cases whatsoever over the District of Columbia and "all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and *other needful buildings*," contemplates the purchase of land "needful," for any reason, to the discharge of any of the constitutional duties or the exercise of any of the constitutional powers of the United States. 289.
4. **Same.—The reservoirs, aqueducts, and other constructions appurtenant to the water supply of the city of Washington, D. C.,** are to be considered "needful buildings" within the meaning of Article I, section 8, of the Constitution, and since a roadway is an appropriate and necessary appurtenance to such works, the Conduit road constitutes territory within the exclusive jurisdiction of Congress. *Ib.*
5. **Destruction of Oyster Beds.**—The destruction by the United States Government of oyster beds held by individuals under leases from the State of New Jersey would be a "taking" within the meaning of the **fifth amendment** to the Constitution. Actual manual caption is not necessary, nor is it essential that the Government make use of the property taken. 441.
6. **Member of Congress as Member of the Board of Managers of the National Home for Disabled Volunteers.**—There is **no constitutional objection** to the election of a Member of Con-

CONSTITUTION—Continued.
gress as a member of the Board of Managers of the National Home for Disabled Volunteers, although such an election would seem to be contrary to sound public policy. 457.

CONSTRUCTION.
OF A CONTRACT. *See* DRY DOCK AT NEW YORK.
OF STATUTES. *See* STATUTORY CONSTRUCTION, p. 713; AND HAWAII.

CONTINUOUS SERVICE. *See* NAVY, 1.

CONTRACT LABOR.
1. **Contract Laborers for Panama Canal—Hours of Labor.**—The Canal Commission has authority to enter into an agreement with the International Contracting Company, of Maine, whereby the latter agrees to supply male Chinamen for work upon the Panama Canal, and to feed, clothe, and transport them back to China at the expiration of their respective contracts of employment, notwithstanding said agreement contains a provision that ten hours shall constitute a day's labor. 1.
2. **Same—The Contract Labor Laws do not Extend to the Canal Zone.**—The act of March 3, 1903 (32 Stat., 1213), extended those laws to "any water, territory, or other place *now* subject to the jurisdiction" of the United States, but the treaty with the Republic of Panama giving the United States jurisdiction of the Zone was of a later date. *Ib.*
3. **Railroad Track Laborers.**—Ordinary laborers, commonly employed in the construction and maintenance of the tracks of railroads, are not "skilled" laborers within the meaning of section 2 of the act of March 3, 1903 (32 Stat., 1214), and may not be imported into this country under contract in any event. 42.
4. **Immigration—Lithographic Artists.**—Two alien lithographic artists, who came to the United States in pursuance of a contract of employment entered into with the American Lithographic Company, of New York, their passage being prepaid by that company, and who have been excluded upon the ground that their admission would be in violation of the acts of February 26, 1885 (23 Stat., 332), and March 3, 1903 (32 Stat., 1213), relating to contract labor, should be admitted, it being shown beyond reasonable doubt that there are not a sufficient number of lithographic artists in the country at the present time to meet the demands of business. 284.

See also IMMIGRATION, 2, 5, 12, 16, 24, 26.

CONTRACT SURGEON.
OF THE NAVY. *See* GOVERNMENT HOSPITAL FOR THE INSANE, 1.

CONTRACTS.

1. **Contract for Support of Patients in Providence Hospital—Surgeon-General of the Army.**—The Attorney-General deems it inexpedient to give an opinion upon a question involving a payment which is clearly proper for the Comptroller to decide, to wit, whether under the annual appropriation for the care of patients in the Providence Hospital, Washington, D. C., the Surgeon-General of the Army may contract with that institution to pay a stipulated sum per month for keeping in a state of preparedness for 95 patients, there not being in every month an average of 95 patients in the hospital, but where the monthly average per year equals or exceeds that number of patients. 431.
2. **Same.**—*Suggested*, that inasmuch as "the monthly number of patients has always, with one exception, equaled or exceeded 95, the total number for the year must have always reached an average of more than 95 for each day of the year, and therefore it is the contract, or the interpretation placed upon it, and not the statute which produces the injustice complained of. *Ib.*
3. **Same.**—*Suggested*, that a contract to pay the full amount appropriated, $19,000 (34 Stat., 1350), for an average of 95 patients per day through the year would satisfy the statute, both in letter and spirit. *Ib.*
4. **Delivery of Granite for the National Museum Building—Payment.**—The contract made with the Thompson-Starrett Company for furnishing the granite for the south pavilion and dome of the new National Museum building requires its delivery by the company on the cars at the Bethel, Vt., quarry within two years from the date originally fixed for the completion of the contract—that is, on or before April 17, 1908—and payment therefor may be made as heretofore, in monthly installments, at the stipulated price. 572.
5. **Same—Withholding Payments on Account of Delay in Supplying Granite.**—The contract does not, however, authorize the superintendent of construction to withhold payments on account of the delay in supplying such granite, but in the event of an extension of time being allowed to complete the contract, may deduct "all expenses for inspection and superintendence and all actual losses and damages to the United States due to the delay beyond the time originally set for its completion," as provided in paragraph 5 of the contract. *Ib.*
6. **Dry Dock at New York—Construction of Contract—Damages.**—The contractor, and not the Government, is responsible, under his contract for the erection of a dry dock at the navy-yard at New York, for damages to the excavation and

CONTRACTS—Continued.

structural work there in progress, caused by water flowing from a concealed drainpipe, the existence of which neither the contractor nor the Government knew, and by a breakage in the rebuilt portion of a sewer which had been diverted around the head of the dry dock, caused, in large measure, by the ground support on the side next the dry dock having been weakened by the excavation, the contract expressly providing, among other things, that the contract price covered all contingencies of every kind; that the entire responsibility for the sufficiency of the shoring and protection of the excavation and various structures should rest upon the contractor; that he shall be responsible for any settlement or damage to the structures that may result directly or indirectly from his operation; and that he shall be responsible for the entire work and every part thereof until completion and acceptance. 103.

7. **Reclamation Service—Members of Congress.—Agreements for the purchase of lands, for water rentals,** for conveyance of water rights, and similar instruments, contractual in form, relating to the adjustment of vested water rights, executed in behalf of the United States by some officer of the Reclamation Service for purposes within the purview of the reclamation act (32 Stat., 388), are "agreements" or "contracts" within the meaning of sections 3739–3742, Revised Statutes, which prohibit any Member of Congress from being a party to, or interested in, any contract with, or on behalf of, the United States which is in its nature executory and continuous as to future performance, and require the insertion therein of the condition prescribed by section 3941. 537.

See also LIGHT-HOUSE; PUBLIC BUILDINGS, 1.

CORPORATE SEAL. *See* CORPORATIONS, 1, 2.

CORPORATIONS.

1. **Corporate Seals—Special Seals—Bonds.**—A corporation may adopt for the purpose and use a seal other than its corporate seal on a bond so as to make the bond a corporate deed of the corporation. 507.

2. **Same.**—An agent of a corporation, appointed by an instrument under the corporate seal of the corporation, may, on its behalf, adopt a special seal so as to make it, in executing the purpose for which he was appointed, the corporate seal of the corporation. *Ib.*

See also PORTO RICO, 1.

CORREGIDOR ISLAND. *See* EIGHT-HOUR LAW, 17.

COURTS.

An employee's fitness, capacity, and attention to his duties are questions of discretion and judgment, to be determined by his superior officers, and such questions are beyond the jurisdiction of any court. 364.

UNITED STATES COURT IN PORTO RICO. *See* PORTO RICO.

COURTS-MARTIAL.

1. **Disapproval of Sentence.**—Where the sentence of a court-martial which found a soldier guilty of desertion was disapproved by the proper reviewing officer, being deemed inadequate, and the soldier ordered, at his own expense, to join his regiment, such disapproval operated, under article 104 of the Articles of War, as an acquittal of the charge, and, as the term of enlistment had expired, there was no warrant for ordering him to further duty. Having been legally tried, he can not be again tried or any other sentence imposed for that offense. 239.
2. **Same—Tantamount to an Acquittal.**—The disapproval of the sentence of a properly constituted court-martial by the proper reviewing authority is, in legal effect, tantamount to an acquittal of the accused by the court of the offense charged, and relieves him from any and all liabilities to which his conviction would have subjected him. *Ib.*
3. **Same.—Article 48 of the Articles of War applies to a soldier** who has been convicted of desertion or, having deserted, is restored to duty without trial, which carries with it an acknowledgment on his part of the fact of desertion, but does not apply to a soldier who, after trial and conviction, has been ordered to duty after the sentence has been expressly disapproved by the proper reviewing officer. *Ib.*

CUSTOMS LAW.

I. IN GENERAL.

1. Under the special legislation relating to the temporary organization of **the Philippine Islands**, they are **treated as territory remaining, as yet, outside of the United States, in a tariff sense,** for the purpose of imposing duties on articles shipped from them "into" this country analogous to those imposed on imports from a foreign country, and having such status that the term "imports" can be properly applied to merchandise brought from them into the United States. 356.

II. APPRAISEMENT, INVOICE, DUTIES.

2. **Invoice—Appraisement—Crates of Glassware.**—In an importation of a number of crates of glassware which were consolidated on one invoice at a lump sum, where the several crates were of different values, but chargeable with the

CUSTOMS LAW—Continued.

same rate of duty, the assessment of duty should not be made upon the basis of the highest valued goods, but all the glassware is chargeable with the same rate of duty, and similarly with regard to a number of cases of pickles imported at the same time which were also placed on one invoice though of different values, but subject to the same rate of duty—the provisions of section 2910, Revised Statutes, having no application in either case. 119.

3. **Same.—Section 2910, Revised Statutes,** is a rule for the assessment of rates of duty and not a rule for the appraisement of values, and has no application except to cases where the goods that have been invoiced at an average rate are not merely of different values, but are also subject to different rates of duty, in which case the duty is to be assessed upon the whole invoice at the rate to which the highest valued goods are subject. *Ib.*

4. **Same.—In case of doubt as to whether a higher or a lower duty** is imposed by a statute, the doubt should be resolved in favor of the importer, "since the intention of Congress to impose the higher duty should be expressed in clear and unambiguous language." (*American Net and Twine Co.* v. *Worthington*, 141 U. S., 468.) *Ib.*

5. **Coal imported for the use of the Navy is subject to the duties** prescribed by paragraph 415 of the act of July 24, 1897 (30 Stat., 190), notwithstanding the coal is imported by the Navy Department and the duties will have to be paid from the appropriations of that Department. 466.

III. DRAWBACK.

6. **Drawback.—Materials brought into the United States from the Philippine Islands on which duty has been paid under the Philippine revenue act** of March 8, 1902 (32 Stat., 54), are to be regarded as "imported materials" within the meaning of the drawback provision (sec. 30) of the tariff act of July 24, 1897 (30 Stat., 211), although not brought in from a foreign country. 355.

7. **Same—Sirup Made from Sugar Brought from the Philippine Islands.—Drawback should be allowed** under section 30 of the tariff act of July 24, 1897 (30 Stat., 211), upon the exportation to Europe of sirup manufactured from raw sugar which was brought into the United States from the Philippine Islands and upon which duties were paid under the Philippine revenue act of March 8, 1902 (32 Stat., 54). *Ib.*

8. **Same.—The general purpose of section 30 of the act of July 24, 1897** (30 Stat., 211), was to provide that whenever materials are brought into the United States under such

CUSTOMS LAW—Continued.

circumstances that they are subject to the payment of duty and used here in the manufacture of finished articles, upon the subsequent exportation of such manufactured articles to a foreign country a drawback shall be allowed upon the material on which duty has been paid. *Ib.*

9. **Same.—The spirit and letter of section 30 are broad enough to include materials brought into this country from the Philippine Islands** and subjected to duty as coming from a territory which, though not a foreign country, has not been permanently incorporated into the United States, and has been temporarily treated by Congress as not within the United States for tariff purposes. *Ib.*

10. **Drawback on Coal Used on American Vessels.**—Continuous customs custody is not essential to the allowance of drawback, under paragraph 415 of the tariff act of July 24, 1897 (30 Stat., 190), on coal imported into the United States and afterwards used for fuel on board of vessels registered under the laws of the United States, propelled by steam, and engaged in trade with foreign countries. 531.

11. **Same.—Sections 2977, 2978, and 3025, Revised Statutes,** relate exclusively to drawback or return of duties on exported merchandise, and **have no application** to the allowance of drawback on fuel coal under paragraph 415 of the tariff act of 1897. *Ib.*

DEPARTMENT OF AGRICULTURE.

PAYMENT OF GEOLOGISTS FOR EXAMINING MINING CLAIMS IN THE NATIONAL FOREST RESERVES. *See* RESERVATIONS, 3.

DEPARTMENT OF COMMERCE AND LABOR.

Commissioner of Labor—Holding of Two Offices—Appointment as Member of the Immigration Commission.—The appointment of the Commissioner of Labor as a member of the Immigration Commission provided for by section 39 of the act of February 20, 1907 (34 Stat., 898, 909), is not an appointment to an "office" within the meaning of section 2 of the act of July 31, 1894 (28 Stat., 205), and he may receive compensation for his services on that Commission in addition to the salary attaching to his office as Commissioner of Labor. 247.

See also IMMIGRATION 30, 35, 38; SEAL FISHERIES, 1.

DEPARTMENT OF THE INTERIOR.

EMPLOYMENT OF GEOLOGISTS TO EXAMINE MINING CLAIMS IN THE NATIONAL FOREST RESERVES. *See* RESERVATIONS, 3, 5.

DEPARTMENT OF STATE.

COST OF PRINTING SLIP LAWS. *See* PUBLIC PRINTING, 1–3.

DEPORTATION. *See* IMMIGRATION, 30.

DEPUTY COLLECTORS OF INTERNAL REVENUE. *See* INTERNAL REVENUE, 1–8.

DESERTION. *See* NAVY, 2.

DESTITUTE CREW. *See* VESSELS, 12, 13.

DESTRUCTION OF OYSTER BEDS. *See* NAVIGABLE WATERS.

DIAMOND SHOAL LIGHT-HOUSE. *See* LIGHT-HOUSE.

DISBURSEMENT OF PUBLIC MONEYS.

1. **Surveyors of customs at ports where there are no collectors** are not to be considered as collectors, and therefore within the provisions of section 3657, Revised Statutes, which requires collectors of customs to disburse all moneys that may be appropriated for the construction of custom-houses, court-houses, post-offices, etc. 108.
2. **Same.**—*Suggested*, that authority for the designation of a surveyor of customs to act in that capacity, where there is no collector, would seem to exist under sections 255 and 3658, Revised Statutes, and for extra compensation, under section 3554, Revised Statutes. *Ib.*

DISCHARGE.

OF ENLISTED MAN. *See* NAVY, 1.

OF SURETY. *See* BONDS, 1–3.

DISTRICT OF COLUMBIA.

1. **Notaries Public—Acknowledgments—Executive Departments.**—The proviso in the act of June 29, 1906 (34 Stat., 622), amending section 558 of the Code of the District of Columbia, which provides that no notary public shall be authorized to take acknowledgments, etc., or perform any official act in connection with matters in which he is employed as counsel, etc., before any of the Executive Departments, applies not only to local attorneys, but to all notaries who practice before the Departments. 236.
2. **The reservoirs, aqueducts, and other constructions appurtenant to the water supply of the city of Washington, D. C.,** are to be considered "needful buildings" within the meaning of Article I, section 8, of the Constitution, and since a roadway is an appropriate and necessary appurtenance to such works, the Conduit road constitutes territory within the exclusive jurisdiction of Congress. 289.

RIGHT OF WAY ALONG THE ANACOSTIA RIVER. *See* RAILROADS, 3–5, 8.

DRAWBACK. *See* CUSTOMS LAW, 6–11.

DRUGS AND MEDICINE ACT. *See* FOOD AND DRUGS ACT, 6–10.

DRY DOCK AT NEW YORK.

Construction of Contract.—The contractor, and not the Government, is responsible, under his contract for the erection of a dry dock at the navy-yard at New York, for damages

DRY DOCK AT NEW YORK—Continued.

to the excavation and structural work there in progress, caused by water flowing from a concealed drainpipe, the existence of which neither the contractor nor the Government knew, and by a breakage in the rebuilt portion of a sewer which had been diverted around the head of the dry dock, caused, in large measure, by the ground support on the side next the dry dock having been weakened by the excavation, the contract expressly providing, among other things, that the contract price covered all contingencies of every kind; that the entire responsibility for the sufficiency of the shoring and protection of the excavation and various structures should rest upon the contractor; that he shall be responsible for any settlement or damage to the structures that may result directly or indirectly from his operation; and that he shall be responsible for the entire work and every part thereof until completion and acceptance. 103.

EASTERN CHEROKEE FUND, DEPOSIT OF. *See* INDIANS, 21.

EIGHT-HOUR LAW.

1. **Construction of Naval Vessels Under Contract.**—The act of August 1, 1892 (27 Stat., 340), limiting the hours of service of laborers and mechanics employed on the public works of the United States, does not apply to vessels under construction for the Navy by contract with builders at private establishments. 30.
2. **Same.—Materials for such vessels,** such as armor, guns, and other articles obtained under special contracts, are *a fortiori*, not within the statute. *Ib.*
3. **Same—Public Works.**—*Suggested*, however, that the words "public works" can not be restricted to the conception of fixed things, such as land and structures thereon. The expression is used in river and harbor acts which provide for repairs to breakwaters and for improving rivers according to projects submitted, including, probably, dredging and deepening of channels, the interest of the United States therein being akin in permanence and completeness to title to real estate and ownership of fixed structures. *Ib.*
4. **Same.**—*Suggested, also*, that there is a difference between "public work" and "public works," the former being the broader term and including the progress or activity, and the latter the product or completed thing. *Ib.*

   Opinion of August 24, 1892 (20 Op., 454), approved and affirmed. *Ib.*
5. **Contractors Furnishing Quartermaster's Supplies.**—The act of August 1, 1892 (27 Stat., 340), known as the "eight-hour law," does not apply to contractors furnishing the Quartermaster's Department with supplies. 36.

EIGHT-HOUR LAW—Continued.

6. **Reclamation Service.**—There is no conflict between the declaration in section 4 of the reclamation act of June 17, 1902 (32 Stat., 388), that eight hours shall constitute a day's work upon the public works therein specified, and the saving clause in section 1 of the act of August 1, 1892 (27 Stat., 340), which allows more than eight hours' work in one calendar day "in case of extraordinary emergency." 64.
7. **Same—Public Works of the United States.—Irrigation works** for the reclamation of arid and semiarid lands, act of June 17, 1902 (32 Stat., 388), perfectly and comprehensively fill the idea of "public works of the United States." *Ib.*
8. **Same—Eight Hours' Effective Labor.**—The eight-hour law contemplated by the act of August 1, 1892 (27 Stat., 340), means eight hours of effective labor. *Ib.*
9. **Same—Labor Outside of Regular Hours.**—The blasting, cleaning of tracks, repair of machinery, and all other similar matters incident to the reclamation work, essential to prompt and continuous service in the regular day, may legally be done before and after regular hours. The law does not prescribe in what hours of the day the labor shall be done. *Ib.*
10. **Same.—Blacksmiths and their helpers, firemen, and pumpmen** are either mechanics or laborers within the meaning of the eight-hour law.
11. **Same.—The status of teamsters, cooks, and flunkies** not determined. [See 20 Op., 459.] *Ib.*
12. **Same—Violations of the Law.**—It is the duty of the engineers of the Reclamation Service to see that the eight-hour law is observed by the contractors and to report violations of that law. *Ib.*
13. **Jetty Work, Columbia River.—The act of August 1, 1892** (27 Stat., 340), known as the "eight-hour law," applies to the jetty work at the mouth of the Columbia River, which is being conducted directly by the Government, and those employed upon that work who come fairly within the meaning of the words "laborers and mechanics" should be restricted to eight hours of effective labor in any one calendar day, irrespective of enforced idleness on other days, except in case of a sudden emergency requiring prompt action. 278.
14. **Same—Cases of Extraordinary Emergency.**—The exception, in section 1 of that act, of cases of extraordinary emergency, was designed to excuse overtime work which must be rendered to avert some sudden unusual emergency, unexpectedly arising and calling for prompt action. *Ib.*

EIGHT-HOUR LAW—Continued.

15. **Hours of Service.—Persons employed as lock tenders, lock helpers, lockmen, and in similar employments** at the locks of the various canals owned and operated by the Government may be called upon to perform service at any hour of the day, and such requirement is legal and proper under the eight-hour law (act of August 1, 1892; 27 Stat., 340) so long as the total service rendered does not exceed eight hours per day. 605.

16. **The eight-hour law includes skilled as well as unskilled workmen**; and the employment of persons for a longer period than eight hours in any one day "when a dam is being raised or lowered" and the service is one "requiring skill and training" which "can not safely be intrusted to inexperienced men," is not an employment in case of an "extraordinary emergency," and is a violation of that statute. *Ib.*

17. **A watchman employed at Corregidor Island, Philippine Islands,** whose duties are "to supervise all arrivals and to see that no one lands on the island without authority; to investigate such matters as the absence from work of native employees; and to make report of those matters," is not a laborer or mechanic within the meaning of the eight-hour law. Such duties pertain more to those of a clerk or superintendent of laborers than to those of a laborer or mechanic. 622.

18. Presumably **watchmen and messengers,** if they are engaged in the work ordinarily assigned to such employees, are not subject to the provisions of the eight-hour law. (27 Stat., 340.) Facts not sufficiently stated so that an opinion thereon could be based. 604.

19. **Watchman in War Department.**—A watchman, "whose duty is to watch the entrance of one of the public buildings occupied by the War Department, executing instructions with regard to admitting persons into the building and permitting public property to be taken out of the building, reporting to his chief any violation of law, disturbance of the peace, etc., that may be brought to his attention, or to guard the building and property therein during the night," is not a laborer or mechanic within the meaning of the eight-hour law. 623.

20. **A laborer,** "whose duty is to perform manual labor in the removal of furniture and office fixtures, cutting grass, washing floors and windows, and general office cleaning," is not a laborer within the meaning of the eight-hour law; such services being more those of a domestic servant than those of a laborer in the usual meaning of the term. *Ib.*

EIGHT-HOUR LAW—Continued.

21. **A hostler,** "whose duty is to feed, drive, and care for horses, and to clean carriages, harness, and stables," is rather a domestic servant than a laborer within the meaning of the eight-hour law. *Ib.*

22. **A messenger,** "whose duty is to sweep floors and do general office cleaning, attend to fires, and carry messages," is not a laborer or mechanic within the meaning of the eight-hour law. *Ib.*

See also PANAMA, 13, 14.

ELECTIONS. *See* NATURALIZATION.

ELIGIBILITY. *See* CIVIL SERVICE, 13–17; CONGRESS, 6–9.

ENLISTMENT. *See* NAVY, 2.

EXCLUSION.

OF SEDITIOUS PUBLICATIONS FROM THE MAILS. *See* POSTAL SERVICE, 1–6.

EXECUTIVE DEPARTMENTS.

I. IN GENERAL.

1. **The terms "Departments," or "Executive Departments,"** as used in acts of Congress and in the Revised Statutes, invariably apply to one or more of the several Executive Departments mentioned in section 158 Revised Statutes, or included within the terms of that section by subsequent enactments, unless a different meaning is clearly indicated by the context. 209.

2. **The term "Department,"** as used in laws relating to the civil service, is distinguished from "Office," "bureau," and "branch;" and subordinates of the several Executive Departments are distinguished from employees of the last-mentioned governmental agencies. *Ib.*

3. **The Government Printing Office, the Interstate Commerce Commission, and the Smithsonian Institution** are independent of any of the Executive Departments mentioned in section 158 Revised Statutes. *Ib.*

4. **The Bureau of Insular Affairs** is an integral part of the War Department. *Ib.*

5. **Notaries Public who Practice Before the Departments—Acknowledgments.**—The proviso in the act of June 29, 1906 (34 Stat., 622), amending section 558 of the Code of the District of Columbia, which provides that no notary public shall be authorized to take acknowledgments, etc., or perform any official act in connection with matters in which he is employed as counsel, etc., before any of the Executive Departments, applies not only to local attorneys, but to all notaries who practice before the Departments. 236.

EXECUTIVE DEPARTMENTS—Continued.

6. **Bureaus and Offices of Executive Departments.**—The rule laid down by Attorney-General Devens in 15 Op., 262, 267, as to what bureaus and offices may be deemed bureaus and offices in any of the Executive Departments, approved. 254.
7. **Establishment of Areas of Forbidden Anchorage.**—There is no general authority under existing law conferred on any Executive Department to establish areas of "forbidden anchorage" in the harbors of the United States. 258.

II. Officers and Employees.

8. **Heads of Departments not Limited as to Character of Work which may be Required of Employees.**—Section 4 of the act of August 5, 1882 (22 Stat., 255), in nowise limits the discretion of the heads of the several Executive Departments as to the character of the work which shall be required of their several employees, but is intended to prevent the employment of subordinate officers or employees at the seat of Government without specific appropriations for their payment. 523.
9. **Transfer of Clerks and Employees.**—It is lawful for the Civil Service Commission to consent to the transfer of a classified employee from an independent office of the Government to a Department or another independent office or bureau, although such employee may not have served three years in the office or bureau from which he seeks transfer, as is required by section 5 of the act of June 22, 1906 (34 Stat., 389, 449), of clerks and employees of the Executive Departments. 209.
10. **Same.—The "field force" of an Executive Department**—that is, its classified employees under its immediate control, as inspectors, examiners, and agents, though employed usually or invariably away from the seat of Government—are governed by the above-mentioned statutory provision with regard to transfers. *Ib.*
11. **Same—Philippine Commission—Isthmian Canal Commission.**—The provisions of the act of June 22, 1906 (34 Stat., 449), with regard to transfer of clerks and employees, are not applicable to the Philippine Commission or to the Isthmian Canal Commission. *Ib.*
12. **Transfer of Clerks and Employees—Act of June 22, 1906.—The three years' limitation** as to transfers in the Executive Departments, prescribed by section 5 of the appropriation act of June 22, 1906 (34 Stat., 389, 449), does not apply to employees and subordinates in post-offices, pension agencies, customs-houses, ordnance establishments, subtreasuries, navy-yards, and quartermaster's establishments. 254.

EXECUTIVE DEPARTMENTS—Continued.

13. **Same.—The language of that act imports that the persons to which it applies are actually "in" the Departments** at the seat of government, or that the performance of duties away from such Departments is by direct orders from and under supervision by those Departments. *Ib.*

FALSE LABELING, BRANDING, ETC. *See* FOOD AND DRUGS ACT; PURE-FOOD LAW.

FERNDENE (steamship). *See* SHIPPING, 3.

FINALITY OF JUDGMENT.

OF CITIZENSHIP COURT. *See* INDIANS, 9.

FINES.

REMISSION OF. *See* IMMIGRATION, 39.

FOOD AND DRUGS ACT.

1. **Tea Inspection Act—Food and Drugs Act.—There is no such repugnancy between** the special tea inspection act of March 2, 1897 (29 Stat., 604), and the general food and drugs act of June 30, 1906 (34 Stat., 768), as to prevent them, generally speaking, from standing together. 166.
2. **Same—Both Statutes Should be Given Effect.—The food and** drugs act does not appear to have been intended as a substitute for the earlier statute in the matter of the importation of tea, but both statutes are cumulative in so far as the importation of tea is concerned, and both should be given effect. *Ib.*
3. **Same—Imported Tea, Standard, Adulteration, Misbranding.**—An importation of tea is, therefore, subject to the provisions of both acts—that is, it must comply with the standards established by the Secretary of the Treasury under the tea inspection act, and must also stand the tests in reference to adulteration and misbranding imposed by the food and drugs act. *Ib.*
4. **Same—Subject to Food and Drugs Act.**—Imported tea, although meeting the requirements of the tea inspection act of 1897, is still subject to the provisions of the food and drugs act of 1906 regarding adulteration, labeling, misbranding, and guaranty. *Ib.*
5. **Same.—In case of repugnancy between any specific provisions** of the two statutes, the provisions of the food and drugs act would prevail to the extent of that repugnancy, and any conflicting provisions of the tea inspection act would, to that extent, be impliedly repealed. *Ib.*
6. **Standard of Strength and Purity to be Enforced—Pharmacopœia of the United States.**—In applying the drugs and medicine act of June 26, 1848 (9 Stat., 237), to importations originating in Italy, the standard of strength and

FOOD AND DRUGS ACT—Continued.
purity to be enforced is that established by the pharmacopœia of the United States, and not that of Italy or any other foreign country. 311.

7. **Same.—Importations originating in any of the countries whose pharmacopœias are mentioned in section 2935, Revised Statutes,** must conform to the pharmacopœia of the country of their origin; but if produced in any other country, whose pharmacopœias are not thus standardized, then the pharmacopœia of the United States must control. *Ib.*

8. **Same—Drugs Imported Must Conform to the Standard and Test Required by the Acts of June 26, 1848, and June 30, 1906.**—The drugs and medicine act of 1848 and the food and drugs act of June 30, 1906 (34 Stat., 768), are, generally speaking, cumulative and should both be given effect, and an importation of drugs should not be admitted if it fails to conform to the standard established by the former or to the tests imposed under the latter. *Ib.*

9. **Same—Adulteration—Misbranding and False Labeling.—Drugs imported from Italy, although meeting the standard required by the drugs and medicine act of 1848, are still subject** to the provisions of the food and drugs act of 1906 regarding adulteration, misbranding, and false labeling, and to any test that may be applied to them by the direction of the Secretary of Agriculture in accordance with section 11 of the latter act. *Ib.*

10. **Same.—The provisions of the drugs and medicine act of 1848, now incorporated in section 2936, Revised Statutes,** that importations found to conform to the standard therein imposed shall be thereupon "passed without reservation, on payment of the customary duties," are repealed by implication, as applied to importations which are subject to rejection under tests of the food and drugs act. *Ib.*

11. **Guaranty of Protection.**—A wholesale dealer in Maryland, who purchased certain food, found afterwards to be adulterated, from a Pennsylvania manufacturer, receiving the latter's written guaranty as to the purity of the goods, in conformity with section 9 of the food and drugs act of June 30, 1906 (34 Stat., 768, 771), and who in turn sold the goods to a retail dealer in the District of Columbia under a similar guaranty, is completely protected by the guaranty of the Pennsylvania manufacturer from prosecution under that act. 449.

12. **Same.—The term "dealer"** as used in section 9 of the above-named act, **includes wholesale as well as retail dealers,** and both are accordingly protected from prosecution by establishing a guaranty in conformity with the requirements of the act. *Ib.*

FOOD AND DRUGS ACT—Continued.

13. **Same—Offense of Guaranteeing not Punishable Until Purchaser Deals with the Article in a Manner Prohibited.**—Section 9 created, in addition to the offense of manufacturing and dealing in adulterated and misbranded foods and drugs, the distinct and substantive offense of guaranteeing such articles, which offense, however, is not complete until the purchaser deals with the article in a manner otherwise punishable by the act. *Ib.*

14. **Same—Former Guaranty a Protection from Prosecution.**—The maker of a false guaranty is protected from prosecution by establishing a former guaranty from the person from whom he purchased. *Ib.*

15. **Same.**—A former guaranty affords a dealer complete protection against punishment for his own false guaranty as well as for selling or shipping the articles in violation of the act. *Ib.*

16. **Same—But Goods may be Confiscated.**—The fact that such wholesale and retail dealers are protected from prosecution does not exempt the adulterated food from confiscation under section 10 of the act. *Ib.*

17. **Labeling of Condemned Medicinal Supplies Intended for Sale by Government Officers.**—A sale under section 1241, Revised Statutes, by Government officers, of drugs and medicines purchased for the use of the Army and afterwards condemned as being unfit for use, is as much subject to the provisions of the food and drugs act of June 30, 1906 (34 Stat., 768), as a sale by a private person would be under similar circumstances, and would render the officers making the sale liable under that act, unless the drugs and medicines so sold are labeled in accordance with its provisions. 547.

18. **Same.—Where a drug so sold is not sold under a name recognized in the United States Pharmacopœia,** a general statement on the label that its quality has deteriorated and that it has been condemned for sale under section 1241, Revised Statutes, would be a sufficient compliance with the food and drugs act of 1906, and would show that it was not sold under any professed standard, and could not be deemed either adulterated or misbranded under sections 7 and 8 of that act. *Ib.*

19. **Same.—Where a drug so sold is sold under a name recognized by the United States Pharmacopœia,** a mere general statement of the character of the drug, showing only the fact of its deterioration is insufficient; and in order that it may not be deemed adulterated, its actual standard of strength, quality, or purity should be stated on the label of each

FOOD AND DRUGS ACT—Continued.
bottle, box, or other container in which the goods are intended to reach the consumer. *Ib.*

20. **Same—Original Makers or Vendors not Affected by such Sale.**—A sale of such condemned drugs and medicines could in no respect affect the original makers or vendors from whom they were purchased before the passage of the food and drugs act of June 30, 1906, unaccompanied by any guaranty under that act, and at a time previous to their deterioration. *Ib.*

See also PURE FOOD LAW.

FOOD AND FOOD PRODUCTS.

Meat Inspection Law—Imported Meats.—The prohibition upon transportation contained in the meat inspection amendment to the agricultural appropriation act of June 30, 1906 (34 Stat., 676), does not apply to meat and meat food products imported from foreign countries. 50.

FOREIGN VESSELS.

TRANSPORTATION OF COAL FOR NAVY. *See* VESSELS, 1–9.

FOREST RESERVES. *See* RESERVATIONS, 3, 4, 6–8.

FORESTRY LAWS. *See* PHILIPPINE ISLANDS, 1.

FRANCHISES. *See* PORTO RICO, 1.

FREE REGISTRATION.

OF OFFICIAL MAIL. *See* POSTAL SERVICE, 16–18.

GEOLOGICAL SURVEY. *See* RESERVATIONS, 3.

GLEN ECHO, MD. *See* CONDUIT ROAD.

GOVERNMENT.

OF THE CANAL ZONE. *See* PANAMA.

GOVERNMENT EMPLOYEE.

Withholding Salary—Judgment Debtor—Clerk in Pension Agency.—Section 1766, Revised Statutes, which provides that no compensation shall be paid to any person who is in arrears to the United States, does not apply to a clerk in the Government service (a pension agency) who is a judgment debtor of the United States. 77.

See also EXECUTIVE DEPARTMENTS.

GOVERNMENT HOSPITAL FOR THE INSANE.

1. **Contract Surgeon of the Navy, Admission.**—A contract surgeon, while serving as such in the Army, is a person belonging to the Army within the meaning of section 4843, Revised Statutes, and if he becomes insane in such service is entitled under that section to admission to the Government Hospital for the Insane. 74.

GOVERNMENT HOSPITAL FOR THE INSANE—Continued.

2. **Maintenance of Insane Inmate of National Soldiers' Home.**—Where an inmate of the National Soldiers' Home becomes insane and is transferred to the Government Hospital for the Insane, the pension received by such inmate is to be devoted to his maintenance and treatment at the hospital; and the excess cost of such maintenance and treatment over the amount of his pension is to be paid from funds appropriated for such hospital. 512.

GOVERNMENT PRINTING OFFICE. *See* EXECUTIVE DEPARTMENTS, 3.

GRADE. *See* NAVY, 19, 31, 33, 34.

GRAND ARMY OF THE REPUBLIC.

LEAVES OF ABSENCE OF MEMBERS WHO ARE GOVERNMENT EMPLOYEES. *See* LEAVES OF ABSENCE.

HAWAII.

1. **Maui County Bonds.—Article 65 of the Hawaiian Laws of 1907,** authorizing an issue of bonds by the county of Maui, which act was vetoed by the governor of Hawaii, but was afterwards passed with the approval of over two-thirds of each house of the legislature, is valid, notwithstanding section 4 of that act provides that the "act shall take effect upon the date of its approval by the President of the United States." 462.
2. **Same.—That section means merely that the act becomes effective upon the President's approval** of those provisions of the act which, according to the terms of the preceding sections, require his approval in order to become effective—that is, his approval of the issue of the bonds. *Ib.*
3. **Same—President's Approval.**—Bonds issued under this act will constitute a legal obligation against the county of Maui whenever the President shall have signified his approval of their issue. *Ib.*

HOSTLER. *See* EIGHT-HOUR LAW, 19.

HOURS OF LABOR. *See* PANAMA, 13; EIGHT-HOUR LAW.

IMMIGRATION.

1. **Contract Labor.—Two alien lithographic artists,** who came to the United States in pursuance of a contract of employment entered into with the American Lithographic Company, of New York, their passage being prepaid by that company, and who have been excluded upon the ground that their admission would be in violation of the acts of February 26, 1885 (23 Stat., 332), and March 3, 1903 (32 Stat., 1213), relating to contract labor, should be admitted, it being shown beyond reasonable doubt that there are not a sufficient number of lithographic artists in the country at the present time to meet the demands of business. 284.

IMMIGRATION—Continued.

2. **State Immigration—Contract Labor Laws.**—The provisions of the acts of February 26, 1885 (23 Stat., 332), February 23, 1887 (24 Stat., 414), and October 19, 1888 (25 Stat., 566), authorizing the exclusion or deportation of contract laborers, were not repealed by the act of March 3, 1903 (32 Stat., 1213), and immigrants coming to the United States during the years 1904–1906 in violation of the act of 1885 could have been and should have been excluded. 180.
3. **Same.**—There was, however, **no authority to exclude aliens not coming within the prohibition of the law of 1885**, although covered by the broader terms of the prohibition in section 4 of the act of 1903, as the latter act contains no provision authorizing the exclusion or deportation of aliens who have been improperly brought to this country. *Ib.*
4. **Same.—The right to exclude depended upon the act of 1887, and the right to deport upon the act of 1888**, both of which acts were dependent upon the act of 1885, which made the coming of certain classes of aliens into this country unlawful. *Ib.*
5. **Same.—The only exception made in the contract-labor laws in favor of States** is contained in the act of March 3, 1891 (26 Stat., 1084), and section 6 of the act of 1903, in reference to advertisements printed and published in foreign countries, stating the inducements they offer for immigration. *Ib.*
6. **Same—Payment of Passage Money, etc.—No Exception in Favor of States.**—In the provisions of the act of 1885 and under section 4 of the act of 1903, in dealing with the payment of passage money or other specific assistance to migration of individual aliens, no exception is made in favor of States, and no exception exists, therefore, in favor of any person because he may act as agent of a State. *Ib.*
7. **Same.—Congress has the undoubted right to regulate the admission of aliens** into the United States, whether as immigrants or otherwise, and to exclude altogether any class of aliens whose entrance it might deem contrary to the general welfare of the Union. *Ib.*
8. **Same—State Can not Nullify Act of Congress.**—No action by any State or by any officer thereof can operate to impair or nullify the effect of a law of Congress duly enacted upon this subject. *Ib.*
9. **Same.—Aliens who came to the United States during the years 1904–1906 at the suggestion** and through the instrumentality **of an officer of the State of South Carolina**, appointed under a statute which expressly permitted him to act as agent for citizens of that State in the procuring of desirable

IMMIGRATION—Continued.

immigrants, which officer, largely or wholly at the expense of such individuals, visited foreign countries and by advertisement, promises of employment, and prepayment of passage, induced a large number of laborers and artisans to migrate to South Carolina, were introduced into the United States in violation of the acts of 1885, 1887, and 1888, and should have been excluded. *Ib.*

10. **Same.—Aliens coming to the United States** under similar circumstances **after the act of February 20, 1907** (34 Stat., 898), becomes effective would unquestionably be liable to exclusion. *Ib.*

11. **Same—Exclusion.**—The determination of the existence of the facts justifying the exclusion of immigrants is, in the first instance, vested in the Secretary of Commerce and Labor. *Ib.*

12. **State Immigration—Contract Labor Laws.—It is lawful for a State to advertise its inducements** to immigration and to state, as part of such advertisement, the scale of wages generally prevailing within its territory. The status of immigrants induced to come to this country by reason of such advertisements would be the same as that of any other aliens lawfully admitted to the United States. 199.

13. **Same—Offer of Prepayment of Passage—State Officer.**—The word "person" in section 4 of the act of March 3, 1903 (32 Stat., 1214), providing that it shall be unlawful for "any person" to prepay the passage of an alien induced to migrate by any offer, solicitation, promise, or agreement to perform labor, does not include a State, but it does include an officer of a State professing to act under its authority. *Ib.*

14. **Same.—The effect of the payment of the passage of an alien** by another is to throw upon the alien the **burden of proof** that he is not liable to exclusion for the reasons mentioned in section 2 of the act of March 3, 1903 (32 Stat., 1214), or as a contract laborer under the act of February 26, 1885 (23 Stat., 332). *Ib.*

15. **Same.—A State may prepay the passage of an alien immigrant out of its public funds, provided** he is qualified in other respects, the advertisement being lawful, and neither the State, nor its officers, nor anyone else having otherwise solicited or encouraged the immigration. The status of such an immigrant would be the same as that of any other alien lawfully admitted to this country. *Ib.*

16. **Same.—The words "promise of employment,"** in section 6 of the act of March 3, 1903 (32 Stat., 1215), are used in a broad sense, meaning not merely an offer of employment

IMMIGRATION—Continued.

which, by acceptance, would create a contract enforceable against some definite person or persons, but any form of words which might be reasonably understood as holding out to a possible immigrant the prospect of assured employment. *Ib.*

17. **Same.—The contribution of money by individuals to a State fund, to be used by the State in advertising its inducements** to immigrants, which advertisement could not lawfully be published by private persons, and to prepay the passage of aliens attracted by such advertisement, though without promise of employment, express or implied, would amount to encouraging or assisting immigration in the form prohibited by section 6 of the act of 1903, and render the parties contributing liable to the penalties provided by section 5 of that act. *Ib.*

18. **Same—The Immigrants Themselves, However, Could not be Excluded.**—There is nothing in the act of 1903, or in any previous act, which would authorize their exclusion because the immigration was induced by advertisement, or even by solicitation or promise of employment, unless there was an enforceable contract existing at the time of application for admission requiring them to render service as laborers. *Ib.*

19. **Same—Exclusion.—The act of February 20, 1907** (34 Stat., 898), provides for the exclusion, after that act takes effect, of aliens solicited or induced to migrate by reason of offers, or promises, even when there is no contract, of employment. *Ib.*

20. **Same—Under Existing Law, Allowed to Enter.**—Under existing law (act of 1903), although their importation is unlawful, and the parties responsible subject to punishment, the aliens themselves are allowed to enter. *Ib.*

21. **Same.—Under the act of 1907 a person whose passage money is paid by another must be prepared to show** not merely that he does not come within any of the categories of immigrants to be excluded, but also that his passage was not paid, directly or indirectly, by a corporation, association, society, municipality, or foreign government. *Ib.*

22. **Same—Payment of Passage Money by Funds Contributed by a Society or Association.**—The payment of passage money of immigrants by a State with its funds is not prohibited by the act of 1907, but its payment with funds contributed by any society or association renders the immigrant liable to exclusion, even though the payment be made through the agency of the State or its officers, and although the immigrant would otherwise be entitled to admission. *Ib.*

23. **Same—Payment by Individuals in Good Faith.**—The same prohibition does not extend, however, to the payment of pas-

IMMIGRATION—Continued.

sage money by individuals, whether directly or through the agency of a State, provided their action is, and is shown to be, in good faith individual and not attended by such combination or concert of action as would make it substantially the act of an association or a society. *Ib.*

24. **State Immigration—Promise of Employment Made by State Officer.**—An alien who arrived at New Orleans from Cuba on August 5, 1907, his passage money having been paid by an agent of the Louisiana State board of agriculture and immigration out of funds appropriated by that State, the agent having assured the alien of employment upon his arrival, which assurance operated as a material, if not the principal, inducement to his immigration, the expectation being that the employer will loan the alien the sum so advanced for the reimbursement of the State—is not entitled to admission to the United States. 410.

25. **Same.—The classes of aliens excluded** by section 2 of the act of February 20, 1907 (34 Stat., 898), include "aliens solicited or induced to immigrate by reason of offers or promises, even if there is no contract of employment." (26 Op., 199, 207.) *Ib.* (411.)

26. **Same.—Section 6 of the act of 1907 contains no exceptions in favor of a State in reference to specific promises of employment** to individual immigrants, nor any requirement that the promises of employment, in order to work exclusion, must be the sole inducement to exclusion. *Ib.*

27. **Same—State Agents.—The right of Congress to regulate the admission of aliens** into the United States clearly controls the action of any State agent in this respect. (26 Op., 180, 193.) *Ib.*

28. **Same—Burden of Proof.**—While the **payment of an immigrant's passage** out of State funds does not of itself require his exclusion, yet such payment operates to throw upon the immigrant the burden of showing that he does not come within any of the otherwise excluded classes, such as paupers, etc., specifically excluded by the act. *Ib.*

29. **Same—Reimbursement of State Fund.—The merely hypothetical possibility** of a condition arising under the indirect method of attempting to eventually secure reimbursement to the State fund of the amount of the alien's passage, which could perhaps be regarded as in effect a payment of his passage by a corporation, society, or association, would not be a ground of exclusion. *Ib.*

30. **Deportation—Selection of Attendants to Accompany the Mentally or Physically Incapacitated.—The Secretary of Commerce and Labor** is empowered by sections 20 and 21 of the

IMMIGRATION—Continued.
act of February 20, 1907 (34 Stat., 898, 904), to select attendants to accompany aliens ordered to be deported, where they are mentally or physically diseased in such a manner as to require attendance and care during the voyage. 381.

31. **Same.—The steamship or transportation companies** by which such aliens came to this country **are required to receive the attendants so selected,** at the same time that they receive the aliens to be deported, and convey them, with the aliens, to the foreign place of destination. *Ib.*

32. **Same—Transportation and Expenses of Attendants.—The steamship companies are required to furnish** such attendants transportation to and from the alien's destination and to defray all expenses incident to such employment. *Ib.*

33. **Same.—The "expense incident to such service"** is all the expense directly and incidentally caused by the fact that such service has been required. **This includes the return trip of the attendant** and also his compensation. The expression "all the expenses incident to the employment and detail of attendants," comes under the same head. *Ib.*

34. **Same—Class in which Attendant may Travel on Return Trip.—** If the attendant in going has traveled in a class in which he would not naturally travel, by reason of the necessity for his constant attendance upon the disordered alien, his ticket may be changed on the return trip. *Ib.*

35. **Same—The Class can not be Determined Arbitrarily by the Department of Commerce and Labor.—**If there are, as suggested, a variety of cases properly admitting of the separate classification of the two persons, the Department of Commerce and Labor can not determine arbitrarily to what class the attendant is to be consigned. *Ib.*

36. **Same.—The steamship company, on the other hand, can not nullify the law by insisting that attendants travel in the steerage** when they are not needed there and are persons who could not be reasonably expected to accept employment upon such conditions. *Ib.*

37. **Same—Interests of the Steamship Company to Prevail Over Mere Pleasure or Convenience of Attendant.—**The interests of the steamship company are, so far as may be consistent with the reasonably successful working of the scheme of sending these attendants, to be allowed to prevail over the mere pleasure or convenience of the persons sent. *Ib.*

38. **Same.—A regulation of the Department which provides** that "attendants will accompany aliens to official destination and will, when proceeding abroad, be required to travel under the same conditions as the alien," is appropriate, if in nearly all cases the usefulness of the attendants would

IMMIGRATION—Continued.

be seriously impaired unless they went in the same class as the alien; but the second part of the regulation, providing that all attendants "when returning shall travel second class," is not binding upon the vessel owners. *Ib.*

39. **Remission of Fines for Failure to Detain and Return Aliens.—The Secretary of Commerce and Labor** has no power to remit a fine imposed by a United States court upon a steamship company for its failure to detain and return to the country whence they came aliens whose deportation has been ordered under section 10 of the immigration act of March 3, 1891 (26 Stat., 1084). 624.

Opinion of Attorney-General Olney (20 Op., 705) and of Attorney-General Griggs (23 Op., 271) concurred in. *Ib.*

IMMIGRATION COMMISSION. *See* DEPARTMENT OF COMMERCE AND LABOR.

INDIANS.

1. **Cherokee Enrollment—Mrs. Alice L. Owen and Children.**—The action of the attorney for the Cherokee Nation in protesting to the Secretary of the Interior on behalf of the Cherokee Nation against the enrollment of Alice L. Owen and her children as citizens by blood of the Cherokee tribe was not a compliance with the conditions named in the act of June 21, 1906 (34 Stat., 340), which authorized such enrollment provided it should not be objected to by said tribe, and should be approved by the Secretary of the Interior. 123.
2. **Same.—The authority of the attorney to act for the Nation** did not extend to matters wherein positive action by the Nation itself was essential, as is required by the express terms of the act. *Ib.*
3. **Same—Objection to Enrollment.**—The tribal council not having been reelected, and there being now probably no officer or body in a position to make the objection required by the act, the first condition mentioned therein appears to have been fulfilled. *Ib.*
4. **Same.—The Secretary of the Interior is required to determine for himself** whether as matter of equity and public policy the enrollment should be made. *Ib.*
5. **Same.**—*Suggested*, **that the children of Mrs. Owen were never bona fide citizens** of the Cherokee Nation, and their enrollment would be clearly without justification were it not for the special act of Congress in question. *Ib.*
6. **Same.**—*Suggested*, **that the marriage of Alice L. Owen to a white man**, her departure from the Cherokee Territory and permanent residence in a distant State, operated as a relinquishment of her rights as a citizen under the terms of the Cherokee constitution, but she might still have been

INDIANS—Continued.

readmitted to citizenship by the governing body of the Cherokee Nation. Her enrollment, therefore, is not open to the objection existing in the cases of her children. *Ib.*

7. **Cherokee Enrollment.—John W. Gleeson**, a white man, intermarried into the Cherokee Nation in 1873, and his name appears on the Cherokee authenticated tribal roll of 1880. He applied to the Commission to the Five Civilized Tribes in 1901 for enrollment, which application was finally denied February 9, 1907, upon the authority of the case of *Red Bird* v. *United States* (203 U. S., 76), he having abandoned his wife in 1878. Section 667 of the Cherokee constitution also provides that every intermarried person who abandons his wife shall thereby forfeit every right and privilege of citizenship in that Nation: *Held*, that the applicant was entitled to enrollment under section 21 of the act of June 26, 1898 (30 Stat., 495, 502), which specifically directs the Commission "to enroll all persons now living whose names are found on said roll." 171.

8. **Same—Removal from Rolls for Fraud.**—The authority given the Commission in the act of June 26, 1898, to eliminate from the tribal rolls those placed thereon by fraud or without authority of law is expressly limited to "any other rolls," meaning any other than the roll of 1880, which was confirmed. *Ib.*

The case of *Red Bird* (203 U. S., 76) distinguished. *Ib.*

9. **Choctaw Citizenship Cases—Citizenship Court—Finality of Judgment.—Myrtie Randolph and W. J. Thompson** were children of a white father by his third wife, a white woman, his first and second wives having been Choctaws. Both parents and these children lived in the Choctaw Nation and were recognized and regarded as Choctaw citizens. The children were enrolled by the Choctaw Committee on Citizenship in 1892. Their application to the Commission to the Five Civilized Tribes for enrollment under the act of June 10, 1896 (29 Stat., 321, 339), was denied, which decision was reversed by the United States court in the Indian Territory, and its judgment affirmed by the Supreme Court. (174 U. S., 445, 469.) Subsequently, on appeal by the nation under the act of July 1, 1902 (32 Stat., 641, 646–649), their application was denied by the Choctaw and Chickasaw Citizenship Court. *Held*, that the citizenship court had jurisdiction and that its judgment is final. 127.

10. **Same.—The application for enrollment** under the act of June 10, 1896 (29 Stat., 339), notwithstanding the fact that applicants were already on the rolls, was a waiver of the

INDIANS—Continued.

conclusiveness of the rolls in their cases, the act providing that the Commission shall hear and determine the application of all persons who may apply to them for citizenship in any of said nations. *Ib.*

11. **Same—Revisory Jurisdiction of the Citizenship Court.**—The act of July 1, 1902 (32 Stat., 641), contemplated that the Citizenship Court should have a revisory jurisdiction of all judgments of the United States courts in the Indian Territory admitting persons to citizenship on appeal from the judgments of the Commission, whether the applicants were on the tribal rolls or not. *Ib.*

12. **Same—Review of Judgments of Citizenship Court.**—No authority has been conferred upon the Secretary of the Interior by the acts of July 1, 1902, paragraph 30 (32 Stat., 646), and April 26, 1906 (34 Stat., 137), to review the judgments of the Citizenship Court. *Ib.*

13. **Cyrus H. Kingsbury and Lucy E. Littlepage,** children of white parents who had become affiliated with the Choctaw Nation by an act of the Choctaw council, and thereby granted all rights, privileges, and immunities of Choctaw citizens, were born in the Choctaw Nation, have always resided there as its recognized citizens, and their names appear upon various tribal rolls. They applied to the Commission to the Five Civilized Tribes under the act of June 10, 1896 (29 Stat., 321, 339), and were enrolled, and no appeal was taken by the nation. *Held*, that they are clearly entitled to enrollment. *Ib.*

14. **Same—Elimination of Names Enrolled by Fraud.**—The only names which the act of June 28, 1898, section 21 (30 Stat., 495, 502-503), declares shall be eliminated from the tribal rolls are those placed thereon by fraud or without authority of law. *Ib.*

15. **Same—Children by a Subsequent Marriage to Other than a Citizen by Blood.**—Since 1875 the Choctaw Nation never intended that a white person intermarrying into the tribe should have power to confer citizenship upon his children by a subsequent marriage to other than a citizen by blood, but this does not apply where both parents have been adopted into the tribe. *Ib.*

16. **Loula West** was admitted to citizenship in the Choctaw Nation by the Commission to the Five Civilized Tribes. The nation appealed to the United States courts in the Indian Territory and the judgment was affirmed. Later, under the act of July 1, 1902 (32 Stat., 641, 647), the case was removed to the Citizenship Court, which denied her application. *Held*, that the Citizenship Court had jurisdiction of such cases, and its judgments therein are final. *Ib.*

INDIANS—Continued.

17. **William C. Thompson** applied to the Commission to the Five Civilized Tribes for the enrollment of himeslf, wife, and children. The application was denied by the Commission, and no appeal was taken therefrom. Claimant relies upon the fact that their names appear upon the tribal roll prepared pursuant to the Choctaw acts of September 18 and October 30, 1896. *Held*, that the action of the Commission, not having been appealed from, was final, and that the Choctaw Nation, even if it attempted to do so, had no right thereafter to admit them, such enrollment being without authority of law. *Ib.*

18. **Same.—The provision in the act of June 10, 1896** (29 Stat., 339), that "any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon" might apply to the legally constituted court or committee of such tribes, with right of appeal to the United States court, had reference to a previous denial or failure of the tribal authorities to act, and not to action or nonaction of the Commission. *Ib.*

19. **Richard B. Coleman** and children were admitted to citizenship in the Choctaw Nation by an act of the general council of the nation, which the record of the case shows was procured by fraud, and the Commissioner held that they had no right to disregard this act of the council. *Held*, that their names should be stricken from the rolls. *Ib.*

20. **Ethel Pierson's case.** The children of Choctaw freedmen who were minors living March 4, 1906, are entitled to enrollment. *Ib.*

21. **Eastern Cherokee Fund—Deposit of, in Banking Institutions.**—The Secretary of the Treasury is not authorized by virtue of the order of the Court of Claims in cause No. 23214, *The Eastern Cherokees* v. *The United States*, to deposit in Government depositories or other banking institutions the sum of $4,000,000 appropriated by the act of June 30, 1906 (34 Stat., 664), in favor of said Eastern Cherokees, in order that interest may be obtained thereon. 330.

22. **Same—Order of the Court of Claims.**—The order referred to was not an order for transfer within the meaning of section 3639, Revised Statutes, but merely a request or authorization, and does not abrogate the prohibitions and penalties imposed by law upon such transfer. *Ib.*

23. **Congress has plenary authority to control the affairs and administer the property of the Five Civilized Tribes** in the Indian Territory and other Indian tribes. 340.

INDIANS—Continued.

24. Seminole Indians—Agreements with, are not Really Treaties.—The agreements between the United States and the Seminole Nation ratified by the acts of July 1, 1898 (30 Stat., 568), and of April 26, 1906 (34 Stat., 137), are not really treaties, and are of legal force and effect only because ratified by Congress. *Ib.*

25. Same—Congress may Alter or Repeal such an Agreement.—Congress having power to abrogate a formal treaty with a sovereign nation, may alter or repeal an agreement with an Indian tribe. *Ib.*

26. Same—Delivery of Seminole Land Patents—Control of Seminole Schools and School Funds.—Congress has power to enact legislation authorizing the delivery of Seminole land patents prior to the expiration of the Seminole government, and also by legislation to modify the terms of the Seminole agreement of July 1, 1898, with reference to the school fund of that nation and authorize the Department of the Interior to assume control of the schools and the school fund. *Ib.*

27. Same—Congress may Impose Restrictions upon the Alienation of Seminole Lands.—The lands of the Seminole Nation having been granted to it merely in its corporate capacity as a nation, the United States Government may, as a condition of their allotment in severalty and the extinguishment of its own ultimate interest therein, impose the restrictions upon their alienation provided by section 19 of the act of April 26, 1906 (34 Stat., 137, 144). *Ib.*

28. Same—Control of Tribal Schools, Lands, and Funds by Secretary of the Interior.—The provisions of section 10 of the act of 1906 (34 Stat., 140) in regard to the control of the tribal schools and the lands and property pertaining thereto by the Secretary of the Interior, and the use of the tribal funds for the purpose of defraying the necessary expenses of such schools, is purely a governmental and administrative matter involving no taking of the property of the nation. *Ib.* (341.)

29. Same—Secretary of the Interior has Exclusive Control.—The purpose of Congress in sections 10 and 11 of the act of April 26, 1906 (34 Stat., 140), was to give the Secretary of the Interior exclusive control, within limitations stated, of the revenues of the Five Civilized Tribes, including the Seminole Nation. *Ib.*

30. Same—Secretary of the Treasury may Require Seminole Warrants to be Approved by the United States Inspector and Paid by the United States Indian Agent.—The Secretary of the Treasury may safeguard all disbursements on behalf of the Seminole Nation now authorized and require that all

INDIANS—Continued.

Seminole warrants issued after January 1, 1907, shall be approved by the United States inspector for the Indian Territory and paid by the United States Indian agent, Union Agency, instead of being paid by the treasurer of the nation. *Ib.*

31. Creek Allotments—Period of Alienation.—The period of five years within which lands allotted to Creek citizens may not be alienated, except with the approval of the Secretary of the Interior, began to run from August 8, 1902, the date of the President's proclamation announcing the ratification by the Creek Nation of the agreement contained in the act of June 30, 1902 (32 Stat., 500). 317.

32. Cherokee Indian Lands—Periods of Alienation.—All lands allotted to citizens of the Cherokee Nation, except homesteads, will be alienable under the act of July 1, 1902 (32 Stat., 716), in five years after issuance of patent. 351.

33. Same—Restrictions as to Full Bloods.—The provision of the act of April 21, 1904 (33 Stat., 189, 204), authorizing the removal of restrictions upon the alienation of lands of all allottees of the Five Civilized Tribes, within limitations stated, and the original five-year restriction as to surplus lands and the twenty-one year restriction in the act of July 1, 1902 (32 Stat., 716), were superseded as to full bloods by section 19 of the act of April 26, 1906 (34 Stat., 137, 144), which forbids full bloods to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to them for the period of twenty-five years after the passage and approval of that act, unless the restrictions be removed by Congress prior to the period indicated. *Ib.*

34. Wyandotte Cemetery, Kansas City, Kans., Right of United States to Dispose of.—The fee-simple title to the lands formerly used as a burying ground by the Wyandotte Indians, now located in Kansas City, Kans., and withheld from sale and permanently reserved and appropriated by the treaty of January 31, 1855, as a public burying ground, has always been in the United States, subject to the right of the Indians to use it as a burying ground; and the Indians having abandoned that right, the United States has authority, under the treaties of January 31, 1855 (10 Stat., 1159), and February 23, 1867 (15 Stat., 513), to dispose of such lands for the benefit of the Indians and to convey a good title thereto. 491.

35. Same.—The treaty of 1855 did not dedicate the land in question to "the general public," the evident intention of the Indians being to continue the use of such grounds solely for the burial of their own dead. *Ib.*

INHERITANCE LEGACY TAXES. *See* INTERNAL REVENUE, 9–16.

INTERNAL REVENUE.

1. **Deputy Collectors of Internal Revenue—Classified Service—Appointment.**—Deputy collectors of internal revenue would seem to be officers of the United States, at least in the sense that they are subject to classification under the civil-service law; but if not officers, they are employees of the United States; and, considered as either, the President has the right to include them in the competitive classified service. 363.
2. **Same—Not Employees of the Collector.**—Deputy collectors of internal revenue can not be considered employees of the collector. *Ib.*
3. **Same—Dismissal—Appointment of New Deputies.—A newly appointed collector of internal revenue has a legal right,** upon taking office, to drop from the service any deputy collector in commission and to appoint deputies of his own selection, in accordance with the rules of the Civil Service Commission. *Ib.*
4. **Same.—An employee's fitness, capacity, and attention to his duties** are questions of discretion and judgment, to be determined by his superior officers, and such questions are beyond the jurisdiction of any court. *Ib.*
5. **Same—Offices of Deputy Collectors Vacated by Appointment of a New Collector.**—A vacancy occurring in the office of collector of internal revenue and the appointment of a successor would seem to have the effect, under section 3149, Revised Statutes, of vacating the offices of the deputy collectors. *Ib.*
6. **Same—Duty to Recommission Old Deputies or Appoint Others from Eligible Register of the Civil Service Commission.**—It is the duty of the newly appointed collector to fill the offices thus vacated, either by recommissioning the deputies in service by an instrument in writing given under his hand, or by selections either from the eligible register or by transfer from other positions in the classified service, the precise method to be adopted being within the administrative discretion of the collector. *Ib.*
7. **Same—Deputies should be Appointed by Collector by an Instrument in Writing.**—Section 3149, Revised Statutes, seems to require that a deputy collector of internal revenue should be appointed by the collector in commission, by an instrument in writing under his hand. *Ib.*
8. **Same—Requirement of Bond from Deputy.**—There is nothing in the civil-service law which in any way interferes with the right of the collector, under section 12 of the act of Feb-

INTERNAL REVENUE—Continued.

ruary 8, 1875 (18 Stat., 307), to require bonds of his deputies payable to himself, for his protection against their neglect, default, or wrongdoing. *Ib.*

9. **Inheritance Legacy Taxes—Refund—Failure to Present Claim Within Two Years.**—Claims arising under the act of June 27, 1902 (32 Stat., 406), are not barred because of the failure of claimants to present them for allowance within two years from the date of payment. 194.

10. **Same—Claims not Governed by Section 3228, Revised Statutes.**—The provisions of the act of 1902 are special and apply to a particular class of obligations against the Government, and, being special, these claims are not governed by the provisions of a prior general statute, section 3228, Revised Statutes. *Ib.*

11. **Same.—Suits for the recovery of money due under the act of 1902** are not actions for the recovery of taxes, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs. *Ib.*

12. **Same—Statute of Limitations.**—The obligation is therefore one payable on demand; and the statute of limitations does not begin to run until there has been a refusal to pay or the equivalent. (*United States* v. *Wardwell*, 172 U. S., 48.) *Ib.*

13. **Same.—The decision in the case of Thacher v. United States** (149 Fed. Rep., 902), as to the matter of protest in the refunding of inheritance legacy taxes, is to be accepted as the rule of action in all claims arising under the various sections of the act of June 27, 1902 (32 Stat., 406). *Ib.*

14. **Same—The Rule of Administrative Action.—The decision in that case**, together with the views expressed in this opinion, should be regarded by the Treasury Department as the rule of administrative action in claims arising under section 3220, Revised Statutes. Opinion of May 7, 1906 (25 Op., 605), in so far as it conflicts with these views, is reversed. *Ib.*

15. **Same—Claim of Margaret P. Daly.**—There is no legal objection to the dismissal, without prejudice, of the claim of Margaret P. Daly and other similar cases in the Court of Claims, for the purpose of settlement in accordance with this opinion; but only those portions of the claims which come clearly within the decision of the Supreme Court in the case of *Vanderbilt* v. *Eidman* (196 U. S., 480) should be paid. *Ib.* 195.

16. **Same.—Such portions of the claims as are affected by the decision in the case of Disston v. McClain** (147 Fed., 114) should be allowed to remain in *statu quo* until that case, now on appeal to the Supreme Court, has been finally decided. *Ib.*

INTERNAL REVENUE—Continued.

17. **Refund of Stamp Taxes Paid Without Protest.—The Commissioner of Internal Revenue has no power**, under section 3220, Revised Statutes, to refund taxes voluntarily paid without protest, under a mutual mistake of law. 472.
18. **Same—Protest.**—The rule is firmly established and unqualified that protest is indispensable to the right to recover taxes claimed to have been illegally exacted. *Ib.*
    Opinion of May 7, 1906 (25 Op., 605), followed. *Ib.*
19. **Duty of Internal-Revenue Officers as to Testifying in Cases of Fraud upon the Revenues.—The Commissioner of Internal Revenue has no authority to define and limit the official duties** of deputy collectors and internal-revenue agents by providing that, while it shall be a part of their official duties to appear before United States commissioners and Federal grand juries in cases involving frauds against the revenue laws, up to the time when the parties charged are bound over to or held by a grand jury, after a prima facie case has been made out and the accused has been so bound over or held, such attendance shall not be a part of their official duties, and they should respond, in such cases, as a rule, only to a regular subpœna and attend "simply as a witness." 518.
20. **Same.—The Secretary of the Treasury would not be authorized to approve of such a definition and limitation** of the duties of deputy collectors and internal-revenue agents, for the reason that section 3163, Revised Statutes, makes it the duty of all such officers to aid in the prevention, detection, and punishment of any frauds in relation to the collection of internal-revenue taxes, and these duties are not finished when a "prima facie case has been made" against the offender. *Ib.*
21. **Same.**—There is no sound distinction between such officers testifying to facts within their knowledge before a United States commissioner or a Federal grand jury, for the purpose of having the accused bound over to court or indicted, and their afterwards testifying upon the trial in the court. *Ib.*
22. **Same.**—Section 321, Revised Statutes, while relating generally to "matters pertaining to the assessment and collection of internal revenue," does not authorize a limitation of the duties of internal-revenue officers and agents in special matters otherwise provided by law. *Ib.*

See also PURE FOOD LAW, 20.

INTERNATIONAL LAW.

1. **Allegiance to New Sovereign.**—It is well settled that in cases of acquisition of inhabited territory, the acquiring sovereign becomes entitled to the allegiance of the inhabitants

INTERNATIONAL LAW—Continued.
unless there is something in the treaty or act of cession providing otherwise. 376.
2. **Laws governing a territory which has passed from one sovereign power to another continue in force** after the authority which enacted them has ceased to exist, only by the consent of the succeeding authority to their continuing validity, implied from its failure to modify or repeal them. 113.
3. **Right to Change Existing Laws.**—As soon as the new government considers existing laws no longer appropriate to attain the ends of government, it has the inherent right to change or annul them, unless its authority in this respect has been curtailed. *Ib.*
See also SEAL FISHERIES, 6.

INTERNATIONAL WATER BOUNDARY COMMISSION. *See* MEXICAN COMMISSION.

INTERSTATE COMMERCE. *See* FOOD AND FOOD PRODUCTS; RAILROADS, 1, 2.

INTERSTATE COMMERCE COMMISSION. *See* EXECUTIVE DEPARTMENTS, 3.

INVOICE. *See* CUSTOMS LAW, 1.

IRRIGATION.
CONSERVATION CHARGES. *See* RESERVATIONS, 6, 7.
RECLAMATION SERVICE, HOURS OF LABOR. *See* EIGHT-HOUR LAW, 6–12.

ISTHMIAN CANAL COMMISSION. *See* EXECUTIVE DEPARTMENTS, 11.

JAPANESE. *See* SEAL FISHERIES, 7.

JUDGMENT.
FINALITY OF JUDGMENT OF CHOCTAW CITIZENSHIP COURT. *See* INDIANS, 9.
JUDGMENT DEBTOR, WITHHOLDING SALARY. *See* GOVERNMENT EMPLOYEE.

JURISDICTION.
OF NAVY DEPARTMENT OVER SUBIG BAY NAVAL RESERVATION. *See* RESERVATIONS, 1, 2.
OVER CONDUIT ROAD, MD. *See* CONDUIT ROAD.

LABELING OR BRANDING.
OF PACKAGES OF WHISKY. *See* PURE-FOOD LAW, 1–13, 20–43.
OF CONDEMNED MEDICINAL SUPPLIES. *See* FOOD AND DRUGS ACT, 17, 18.
OF IMPORTED DRUGS. *See* FOOD AND DRUGS, 9.

LEAVES OF ABSENCE.

Government Employees who are Members of the Grand Army of the Republic.—The President is without authority to grant an extension of leave of absence with pay to members of the Grand Army of the Republic employed in the Government service who attend the annual encampment of that order. 336.

LEGACY TAXES. *See* INTERNAL REVENUE, 9–15.

LEGATION AT CONSTANTINOPLE. *See* PUBLIC BUILDINGS, 4.

LIBRARY OF CONGRESS.

1. **Bequests to.**—"The Library of Congress" is not a proper legatee to be named in a bequest. 447.
2. **Same—Form of Bequest.**—The question as to what is the best form of such a bequest depends upon the law of the testator's domicile, and it is therefore impossible to formulate any particular style of bequest that will be everywhere valid and in proper form. *Ib.*
3. **Same.**—However, a bequest "to the United States of America, to be deposited in the Library of Congress," which latter part may be varied in case of pecuniary bequests to "to be applied to the increase or improvement of the Library of Congress," will, it is believed, be a satisfactory form to be used generally in the States of the Union and in other English-speaking countries. *Ib.*

LIGHT-HOUSE.

1. **Diamond Shoal Light-House—Commencement of Construction.**—Under the facts stated, there has been no such "commencement of construction," in good faith or otherwise, by Albert F. Eells, who was authorized under the act of March 3, 1905 (33 Stat., 1266), to construct, on conditions specified, a light-house and signal station upon the outer Diamond Shoal at Cape Hatteras, North Carolina, as was contemplated by that act, but only some preparation therefor. 337.
2. **Same.**—The term "construction," as used in that act, means an actual putting together of the parts of the light-house in their proper place and order, with regard to each other, if not necessarily upon the site to be occupied. *Ib.*
3. **Same.**—By the expression "commencement in good faith," the beginning of a continuous operation of construction was intended, rather than the making of a first move followed by an immediate cessation of work and with no apparent readiness to proceed further. *Ib.*

LOCK TENDERS. *See* EIGHT-HOUR LAW, 15.

MAILS.

EXCLUSION OF SEDITIOUS PUBLICATIONS FROM THE MAILS. *See* POSTAL SERVICE, 1–6.

FREE REGISTRATION OF OFFICIAL MAIL. *See* POSTAL SERVICE, 16–18.

WEIGHING OF THE MAILS. *See* POSTAL SERVICE, 7–12.

MARINE BARRACKS.

AT ANCON, PANAMA, APPROPRIATIONS. *See* PANAMA, 15, 16.

MARKING OR BRANDING.

PACKAGES OF DISTILLED SPIRITS. *See* PURE FOOD LAW, 1–13, 20–43.

MATES. *See* NAVY, 15–29.

MAUI (HAWAII) COUNTY BONDS. *See* HAWAII.

MEAT INSPECTION. *See* FOOD AND FOOD PRODUCTS.

MEDICAL DIRECTOR OF THE NAVY. *See* NAVY, 34.

MEMBERS OF THE SAME FAMILY.

ELIGIBILITY TO APPOINTMENT. *See* CIVIL SERVICE, 13–17.

MESSENGER. *See* EIGHT-HOUR LAW, 21.

MEXICAN BOUNDARY.

1. **The authority of the International Water Boundary Commission,** under the convention of 1889 (26 Stat., 1512) with Mexico, is restricted to the determination of questions respecting the boundary alone, and does not extend to the adjudication of private rights and liabilities. 250.

2. **Same—Diversion of the Rio Grande—Decision of the Commission Binding, but Powerless to Carry it into Effect.**—The Commission having found that the American Rio Grande Land and Irrigation Company, by the construction of its works, which changed the channel of the Rio Grande at a point forming the boundary line between the United States and Mexico, violated the stipulations of that treaty, the judgment is binding upon both countries, and the Commission is *functus officio* as regards the carrying into effect of their decision. *Ib.*

3. **Same.—The Federal statutes** (sec. 563, Rev. Stat., and act of August 13, 1888, sec. 1; 25 Stat., 433) **provide a right of action and a forum to citizens of Mexico** who have been injured by the action of the irrigation company. *Ib.*

4. **Same.—It is the duty of the United States to vindicate the injury done to Mexico regarding the boundary line,** and to that end the United States may proceed by bill in equity to obtain mandatory relief in some appropriate form to compel the restoration of the *status quo ante*. *Ib.*

Opinion of Attorney-General Harmon (21 Op., 274) distinguished. *Ib.*

MILITIA. *See* NATIONAL GUARD.

MILITARY RESERVATIONS. *See* PHILIPPINE ISLANDS, 1.

MUSTERING REGULATIONS. *See* ARMY, I, 2.

NATIONAL FOREST RESERVES. *See* RESERVATIONS, 3, 4, 6–8.

NATIONAL GUARD.

1. **Organized Militia—Contest for Prizes and Trophies.**—Those portions of the military organizations of the several States, Territories, and the District of Columbia that are intended for naval service are portions of the organized militia, and as such are entitled to participate in the contest for prizes and trophies provided for in the act of March 2, 1907 (34 Stat., 1175). 303.
2. **Naval Brigades Organized Under State Laws Included.**—**The terms "National Guard" or "Organized Militia," as used** in the act of March 2, 1907 (34 Stat., 1175), **embrace the** whole of the militia organized under the laws of the States or Territories, whether intended for land or naval service, and are not restricted to such portions thereof as are intended for land service only. *Ib.*

NATIONAL MUSEUM BUILDING. *See* CONTRACTS, 4.

NATIONAL SOLDIERS' HOME. *See* SOLDIERS' HOME.

NATURALIZATION.

1. **Naturalization Hearings Preceding General Elections.**—**The** proviso to section 6 of the naturalization act of June 29, 1906 (34 Stat., 598), forbidding the issuing of any certificate of naturalization by any court within thirty days preceding the holding of any general election within its jurisdiction, does not forbid hearings on petitions for naturalization within such time, but merely forbids the issuing of such certificates within that time. 611.
2. **An alien is not naturalized until the order divesting him of** his former nationality and making him a citizen of the United States has been signed by a judge of a court having jurisdiction of such cases. *Ib.*
3. **The evident purpose of Congress** in requiring that final action in naturalization cases shall be had only on stated days to be fixed by a rule of the court and that in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting notice of such petition, was to prevent the granting of certificates of naturalization unless due notice is given to the United States and an opportunity afforded to oppose the application. *Ib.*
4. **Adjournment of Hearing.**—Where the rule day is fixed by order of the court and the United States attorney has an opportunity to be present and be heard, the judge may, in his discretion, adjourn the hearing to such time as may suit his convenience and the convenience of the parties to the case. *Ib.*

NAVAL BRIGADE. *See* NATIONAL GUARD.

NAVAL HOSPITAL AT YOKOHAMA.

1. **Title to Land.**—The money appropriated by the act of June 29, 1906 (34 Stat., 568), for the purchase for the naval hospital at Yokohama, Japan, of land adjoining its grounds, may properly be expended for the purchase of a lease in perpetuity to said land subject to an annual rental to the Japanese Government, that being the tenure by which the land is now held and the only title that can be obtained, and the Imperial Government having indicated that it has no objection to the transfer for the purpose named. 12.
2. **Same.—The purchase of the leasehold** with the consent of the Japanese Government would, for all practical purposes, be equivalent to a purchase of the land itself. *Ib.*
3. **Same.—The word "State,"** as used in section 355, Revised Statutes, regarding the acquisition of land for the erection thereon of any armory, arsenal, etc., or any other public building of any kind whatsoever, signifies a State of the Union. *Ib.*

NAVAL VESSELS. *See* NAVY, 36; EIGHT-HOUR LAW, 1, 2.

NAVIGABLE WATERS.

1. **Destruction by United States of Oyster Beds Leased by Individuals from a State—Compensation.**—The interests of private individuals or companies in oyster beds held under leases from the State of New Jersey constitute private property which can not be taken or destroyed by the United States Government for public purposes without making just compensation therefor. 441.
2. **Same—Such Interest Constitutes Private Property.**—The title of the State to such lands is in no wise inconsistent with its power to grant, or with the power of purchasers or other grantees to acquire, in such lands, a private property which is pecuniarily valuable and should not be taken without compensation. *Ib.*
3. **Same—Compensation.**—There has never been a doubt that where really private property is actually taken for public use just compensation must be made therefor. *Ib.*
4. **Same.—The destruction of the oyster beds in question will be a "taking"** within the meaning of the Fifth Amendment to the Constitution. Actual manual caption is not necessary, nor is it essential that the Government make use of the property taken. *Ib.*

NAVY.

I. IN GENERAL.

1. **Discharge — Reenlistment — Continuous Service. — An enlisted man** in the Navy who was appointed as mate and continued to serve as such after the expiration of his term of enlist-

NAVY—Continued.

ment, without receiving a discharge, is still in the service and entitled to his discharge, and may be permitted to reenlist with the benefit of continuous service under article 839 of the Navy Regulations of 1905. 319.

2. **Enlistment — Desertion — Pardon — Reenlistment.** — A person who, having enlisted in the Navy, deserts therefrom and is convicted of desertion by a general court-martial and thereafter receives from the President a full and unconditional pardon for such offense and restoration to civil rights, may be permitted to reenlist in the Navy notwithstanding the provisions of section 1420, Revised Statutes. 617.

II. OFFICERS—APPOINTMENT, ADVANCEMENT, RETIREMENT, ETC.

3. **Recess Appointment of a Naval Officer.—The President has power during the recess of the Senate,** and pursuant to the act of March 4, 1907 (34 Stat., 1407), which authorized him, by and with the consent of the Senate, "to reinstate Leonard Martin Cox in the Corps of Civil Engineers of the Navy," to appoint Mr. Cox to the position indicated, provided such appointment be expressed to expire at the end of the next session of the Senate. 234.

4. **Same.—The words "may happen," in Article II, section 2, clause 3, of the Constitution,** mean "may happen to exist." Therefore the President has power whenever and however a vacancy first occurred, whether by death, resignation, etc., or by the creation of a new office by act of Congress, which is an "original vacancy," to fill the place during the recess of the Senate by a temporary appointment under a commission which shall expire at the end of the next session of the Senate. *Ib.*

5. **Same.—The salary or compensation of a person so appointed** can not be paid, "if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate." (Sec. 1761, Rev. Stat.) *Ib.*

6. **Advancement on Retired List.**—The act of June 18, 1884 (23 Stat., 45), which provides for the nomination and appointment of Assistant Engineer John W. Saville, of the United States Navy, then on the retired list, to be a passed assistant engineer in the Navy and that he be placed on the retired list with the highest rate of retired pay of that grade, did not effect a new retirement nullifying the original retirement, but merely effected an advancement on the retired list, the effect of which was merely to advance him one grade on that list. 111.

NAVY—Continued.

7. **Same.**—Mr. Saville is therefore **debarred from advancement** under the act of June 29, 1906 (34 Stat., 553, 554), which provides that the act shall not apply to any officer who received an advance of grade at or since the date of his retirement. *Ib.*
8. **Relative Rank of Officers.**—Section 1466, Revised Statutes, fixes the relative rank of officers of the Army and of the Navy. 16.
9. **Same.—The expression "lineal rank being considered,"** in that section, means simply that it is not necessary to specify and fix relative staff rank, since staff officers in both services possess assimilated lineal rank. *Ib.*
10. **Same—Marine Corps and Staff Corps of the Navy.—There is no statutory provision** expressly regulating the relative rank and precedence of officers of the Marine Corps and officers of the several staff corps of the Navy, but there are provisions which, with the long-established and settled usage and practice of the Army and Navy, regulate it with the same certainty as if by enactment in terms. *Ib.*
11. **Same.—Whatever will be the relative rank of an officer of the Army** to either line or staff officers of the Navy, that would also be the relative rank as to them as officers of the Marine Corps. *Ib.*
12. **Same—A Complete Guide.—The opinion of October 7, 1905** (25 Op., 517), with the additional holding that sections 1466 and 1603, Revised Statutes, apply also to officers of the staff corps of the Navy, furnishes a complete guide to the provisions of law which regulate the relative rank and precedence of officers of the Marine Corps and of the several staff corps of the Navy. *Ib.*
13. **Same—Amendment of Navy Regulations.**—The Navy Department would not have the authority (with the approval of the President) to amend the Navy Regulations so as to do away with the practice as to the relative rank of officers of the Marine Corps and line officers of the Navy, established in accordance with the opinion of the Attorney-General of October 7, 1905 (25 Op., 517). *Ib.*
14. **Same—President can not Change the Relation as to Rank Between Officers.**—The relation as to rank which officers of the Marine Corps hold to other officers is prescribed by section 1603, Revised Statutes, and could not be changed by any act of the President or of the Navy Department. *Ib.*
15. **Mates—Retired List—Officers of the Navy—Warrant Officers.**—Mates whose names are borne on the retired list of officers of the Navy in accordance with the act of August 1, 1894 (28 Stat., 212), are officers of the Navy, but they are neither commissioned nor warrant officers, although with

NAVY—Continued.

respect to the law regulating retirements they are placed by the act of June 29, 1906 (34 Stat., 554), upon the same footing as warrant officers. 433.

16. **Same.—A person can**, under the provisions of sections 1409 and 1410, Revised Statutes, **be at the same time an officer of the Navy and an enlisted man**, the distinction being between commissioned officers and the enlisted force. *Ib.*

17. **Same—Entitled to Advancement Under Act of June 29, 1906, upon Retirement.**—Although commissioned officers of the Navy are appointed by the President by and with the advice and consent of the Senate, warrant officers by the President alone, and mates by the heads of departments, all are alike officers of the United States, and in accordance with the acts of 1894 and 1906 all are alike entitled to the benefits of the advancement provided for by the last-mentioned act whenever otherwise qualified. *Ib.*

18. **Same.**—The mates in question are entitled, in the discretion of the President, and by and with the advice and consent of the Senate, to the benefit of the advancement provided in the case of retired officers, under the circumstances enumerated in the act of June 29, 1906 (34 Stat., 554). *Ib.*

19. **Same—Effect of Advancement—Grade—Rank and Retired Pay.**—While the effect of such advancement may not be to place them in a different grade, they obtain the rank and retired pay belonging to the next higher grade in that service, being that of the lowest grade of warrant officers. *Ib.*

20. **Same—Rank and Pay of Mate.—It was not intended, in the opinion of October 15, 1907** (*ante*, p. 433), to define any particular rate of pay which mates should receive on retirement, or to say more than that they were entitled under the act of June 29, 1906 (34 Stat., 554), to the rank and retired pay of the next higher grade. 589.

21. **Same.—The retired pay of a mate in the Navy**, whether retired under section 11 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), or under the act of June 29, 1906 (34 Stat., 554), is the retired pay of a warrant officer with the same length of previous service, which is three-fourths of the sea pay of such officer. *Ib.*

22. **Same—Amount of Pay.**—Retirements under the act of June 29, 1906 (34 Stat., 554), and under section 11 of the Navy personnel act of March 3, 1899 (30 Stat., 1007), are in effect the same as regards the amount of pay. Under the act of 1899 an officer is retired with "three-fourths of the sea pay" of the next higher grade, and under the act of 1906 he would be retired with the "retired pay" of the

NAVY—Continued.

next higher grade, which, under the act of March 3, 1873 (17 Stat., 547), is "seventy-five per centum" of the sea pay of such higher grade or rank. *Ib.*

23. **Same.—The sea pay of a warrant officer under section 1556, Revised Statutes, is a variable quantity**, ranging by varying sums from $1,200 to $1,800 per annum, according to length of service, any one of which may, in a sense, be said to be the sea pay of a warrant officer. *Ib.*

24. **Same.—The purpose of section 11 of the act of 1899, when applied to mates,** was not to retire them with three-fourths of the lowest sea pay given to a warrant officer, but to give them three-fourths of the varying sea pay of such officers, upon the same conditions, which conditions include length of previous service. *Ib.*

25. **Same.—A retired mate in the Navy may be credited with his prior service** in the Navy at the date of his retirement in determining his classification for pay. *Ib.*

26. **Same—Mate Jenney Became Entitled to Advancement September 26, 1899.**—Mate William Jenney, of the Navy, retired, became entitled, under section 11 of the act of March 3, 1899, to advancement from the date of his retirement on September 26, 1899, and not from the date of the Department's letter to him of November 26, 1907. *Ib.*

27. **Erroneous Retirement of Mate Neilson under Section 17 of the Act of 1899.—Mates in the Navy are officers** within the meaning of section 11 of the navy personnel act of March 3, 1899 (30 Stat., 1007), and of the act of June 29, 1906 (34 Stat., 554); and Mate Neilson, who was erroneously retired in March, 1899, under section 17 of the Navy personnel act, upon his own application and after thirty years' service, was entitled to retirement under section 11 of that act. 615.

28. **Same—Should be Corrected to Show a Retirement under Section 11 of that Act.**—This retirement on the part of Neilson, by reason of the holding of the officers of the Government that he could not be retired as an officer under section 11 of the act of 1899, did not forfeit any legal right which he had to retirement under that section. His retirement should therefore be so corrected as to show a retirement under section 11, with the rank and retired pay of a warrant officer with twelve years' service, and from his original retirement. *Ib.*

29. **Same.**—In any event, **Neilson is now entitled to be retired under the act of June 29, 1906, with the rank and retired pay** of a warrant officer having twelve years' service, but such a retirement would be from the date of retirement and would

NAVY—Continued.

deprive him, during the intervening years, of the increased pay to which he became entitled at the time of his retirement March 31, 1899. *Ib.*

30. **Advancement—Retirement—Rank.—Passed assistant engineers** of the Navy entitled to advancement to the grade of chief engineers, and assistant engineers entitled to advancement to the grade of passed assistant engineers, under the act of June 29, 1906 (34 Stat., 554), should be retired with a rank above that held by them, respectively, at the time of retirement, and with the pay of that rank. 487.

31. **Rank and Grade at Retirement—Passed Assistant Engineers.**—The act of June 29, 1906 (34 Stat., 554), providing for the retirement of certain officers of the Navy, authorizes their retirement with the rank of the next higher grade, which is that next above the rank held by them, respectively, at the time of retirement. 496.

32. **Additional Passed Assistant and Assistant Paymasters—Appointment—Distribution in Grades.**—The number of passed assistant and assistant paymasters in the Navy to be appointed in each of the two grades under the act of March 3, 1903 (32 Stat., 1197), not being prescribed by that act, is necessarily left to Executive discretion, to be controlled by the general terms and regulations providing for the advancement of officers in the naval service. 511.

33. **Same.**—Nor is it required that the relative proportion of officers in each of those two grades shall remain always the same, a change in the proportion being within the discretion of the Executive, unless controlled by general laws or regulations. *Ib.*

34. **Retirement—Rank—Grade.—A medical director in the Navy** who after forty years of service was retired with the relative rank of commodore, but with the retired pay of a medical director, did not thereby receive an advance of grade within the meaning of the proviso to the naval appropriation act of June 29, 1906 (34 Stat., 554), and is therefore entitled to the increase of pay provided for by that act. 57.

35. **Same—Relative Rank Sometimes only an Honorary Distinction.**—This relative rank of a higher grade sometimes conferred upon officers on retirement is only an honorary distinction, serving merely to fix their places, in precedence, with fellow officers. Such officers do not bear the title of the higher grade, but retain the title actually held by them on retirement. *Ib.*

NAVY—Continued.

III. VESSELS.

36. **Submarine and Subsurface Boats—Construction or Purchase.**—The Secretary of the Navy is authorized to expend a part of the moneys appropriated by the acts of June 29, 1906 (34 Stat., 583), and March 2, 1907 (34 Stat., 1204), for the construction or purchase of one or more submarine boats of the Lake type, provided he shall be satisfied that the boat or boats in question when completed will be at least equal in value for purposes of naval warfare to the Octopus, or whatever other boat may have been in his judgment, on March 2, 1907, the best boat of the submarine class owned by or under contract for the Government. 321.

37. **Same.—The words "any boat that does not in such test prove to be"** equal to the best boat now owned by the United States, in the act of March 2, 1907 (34 Stat., 1204), must be understood as meaning "any boat that is not shown by the result of such tests likely to be." *Ib.*

38. **Same.—The word "equal,"** in the same provision, must be understood as meaning "at least equal" or "not inferior;" and the words "in value for naval purposes," or equivalent language, must be read into the passage after the word "equal." *Ib.*

39. **Same.—The comparison involved in the provision** is not one between the boats competing in the tests, nor between the types of boats thereby described, but between a boat to be constructed and the best boat of the same class now owned or contracted for by the Government. *Ib.*

40. **Same—Subsurface Boats—Authority of the Secretary of the Navy to Purchase.**—Upon the hypothesis, as the papers submitted tend to show, that the United States did not own on March 2, 1907, and had not contracted for, any boat of the subsurface type, *Held*, that the provisions of the act of 1907, above referred to, have no application to boats of the subsurface type, and the Secretary of the Navy is authorized, in his discretion, to expend a portion of the appropriation therein made for the purchase of subsurface boats of the type submitted to trial. *Ib.*

CONSTRUCTION OF NAVAL VESSELS. *See* EIGHT-HOUR LAW, 1–4.

SUBMARINE AND SUBSURFACE BOATS. *See* NAVY, 36–40.

TRANSPORTATION AND IMPORTATION OF COAL FOR. *See* VESSELS, 1–11; CUSTOMS LAW, 5.

CONTRACT SURGEON. *See* GOVERNMENT HOSPITAL FOR THE INSANE, 1.

NAVY DEPARTMENT.

JURISDICTION OVER SUBIG BAY NAVAL RESERVATION. *See* RESERVATIONS, 1, 2.

NOTARIES PUBLIC. *See* DISTRICT OF COLUMBIA, 1.

NUMBER OF PASSENGERS ALLOWED ON STEAMBOATS. *See* STEAMBOAT-INSPECTION SERVICE.

OFFICIAL BONDS. *See* BONDS, 1–5; TREASURY DEPARTMENT, 6.

OFFICE AND OFFICERS.

1. **Congress may prescribe qualifications for office and require** that appointments shall be made from among those who have shown by proper tests to have those qualifications. 502.
2. **Appointment—Holding of Two Offices—Commissioner of Labor.**—The appointment of the Commissioner of Labor as a member of the Immigration Commission provided for by section 39 of the act of February 20, 1907 (34 Stat., 898, 909), is not an appointment to an "office" within the meaning of section 2 of the act of July 31, 1894 (28 Stat., 205), and he may receive compensation for his services on that Commission in addition to the salary attaching to his office as Commissioner of Labor. 247.
3. **Recognition in a Statute as an Officer.**—The recognition in a Federal statute of a person in the public employ as an officer of the United States constitutes such person an officer. 364.

OFFICERS OF INTERNAL REVENUE. *See* INTERNAL REVENUE.

OFFICERS OF THE MARINE CORPS. *See* NAVY, 10–14.

OFFICERS OF THE NAVY. *See* NAVY.

OFFICIAL MAIL. *See* POSTAL SERVICE, 16–18.

OFFICIAL REGISTER OF THE UNITED STATES. *See* PUBLIC PRINTING, 4.

OLEOMARGARINE LAW.

Violation of—Compromise.—The officers of the Treasury Department are authorized, in accordance with the provisions of section 3229, Revised Statutes, to compromise a case involving a violation of the "Oleomargarine" statutes, upon terms which, in their judgment, are just and reasonable. 282.

ORGANIZED MILITIA. *See* NATIONAL GUARD.

OYSTER BEDS.

DESTRUCTION OF, BY UNITED STATES. *See* NAVIGABLE WATERS, 1–4.

PANAMA.

1. **Canal Zone—Government of.**—The President may now, directly or through persons appointed and employed by him to govern the Canal Zone and build the Panama Canal, adopt needed rules and regulations for the government of that Zone, and he has not lost the power to modify any of the

PANAMA—Continued.
rules and regulations established by the Canal Commission prior to the Fifty-eighth Congress. 113.
2. **Same.—Section 2 of the act of April 28, 1904** (33 Stat., 429). which provided that until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, "the power to make all rules and regulations necessary for the government of the Canal Zone * * * shall be vested in such person or persons and shall be exercised in such manner as the President shall direct," is to be considered as declaratory only of what would have been the rights and duties of the President if it had not been enacted. *Ib.*
3. **Same—Powers of Government to be Exercised by President.**—The limitation of the effect of the provision to the Fifty-eighth Congress merely indicates that during the period of its own lawful existence, unless sooner modified, Congress intended that the powers of government which it might have lawfully exercised in the Canal Zone should be exercised by the President, or such officers or persons as he might designate. *Ib.*
4. **Same—Obligations Imposed on the United States.**—Articles II and III of the treaty between the United States and the Republic of Panama (33 Stat., 2234), imposed upon the United States the obligations as well as the powers of a sovereign within the Canal Zone, including among these the obligation of providing a government for the territory in question. *Ib.*
5. **Same—Power to Administer the Canal Zone.—In the absence of action by Congress distinctly denying that right,** the President would have the power to administer the Canal Zone merely because control, with the incidents of sovereignty, over it was passed to the United States, and no other provision for its orderly government had been made. *Ib.*
6. **Same—Power to Modify or Repeal any Previously Existing Law.**—This authority involves the right and power to modify or repeal any laws previously existing within that territory, whether originally enacted before or after its acquisition by the United States. *Ib.*
7. **Same.—Laws governing a territory which has passed from one sovereign power to another continue in force** after the authority which enacted them has ceased to exist, only by the consent of the succeeding authority to their continuing validity, implied from its failure to modify or repeal them. *Ib.*
8. **Same—Inherent Right to Change or Annul Existing Law.**—As soon as the new government considers existing laws no

PANAMA—Continued.

longer appropriate to attain the ends of government, it has the inherent right to change or annul them, unless its authority in this respect has been curtailed. *Ib.*

9. **Passports—Natives Residing in the Canal Zone.**—Citizens of Panama who were residents of the Canal Zone at the time of the treaty between the United States and Panama, and who have not taken any affirmative action to retain citizenship in that Republic, owe allegiance to the United States and are entitled to passports. 376.

10. **Same.—Section 4076, Revised Statutes**, which provides that no passport shall be granted or issued to any other persons than those owing allegiance to the United States, means permanent allegiance, and not the temporary allegience owing from a resident. *Ib.*

11. **The sovereignty of the Canal Zone** is not an open or doubtful question. *Ib.*

12. **The words "sovereign rights," "within the Zone,"** in Article III of the treaty of November 18, 1903, with Panama (33 Stat., 2234), mean, among other things, the right to the allegiance of the Zone's people. *Ib.*

13. **Panama Canal—Contract Laborers—Hours of Labor.**—The Canal Commission has authority to enter into an agreement with the International Contracting Company, of Maine, whereby the latter agrees to supply male Chinamen for work upon the Panama Canal, and to feed, clothe, and transport them back to China at the expiration of their respective contracts of employment, notwithstanding said agreement contains a provision that ten hours shall constitute a day's labor. 1.

14. **The contract labor laws do not extend to the Canal Zone.**—The act of March 3, 1903 (32 Stat., 1213), extended those laws to "any water, territory, or other place *now* subject to the jurisdiction" of the United States, but the treaty with the Republic of Panama giving the United States jurisdiction of the Zone was of a later date. *Ib.*

15. **Panama Canal Appropriations—Marine Barracks at Ancon.**—The Isthmian Canal Commission is legally empowered, acting under the direction of the President, to avail of the Panama Canal appropriations (acts of December 21, 1905, 34 Stat., 5, and June 30, 1906, 34 Stat., 697, 761, 762) for the purpose of erecting and maintaining marine barracks in the vicinity of Ancon, Isthmus of Panama. 81.

16. **Same.**—The Navy appropriation act of June 29, 1906 (34 Stat., 553, 581), providing for the renting, leasing, improvement, and erection of barracks for the Marine Corps at Porto Rico, Hawaii, Guam, etc., "and at such other places as the

PANAMA—Continued.

public exigencies require," although specific, is not exclusive. *Ib.*

17. **Same.—The rule that a specific appropriation is exclusive,** and that another general appropriation is not available for the same purpose, is a rule of administration firmly established by the accounting branch of the Government, and is not a statutory limitation. This rule, while a proper one, has obvious exceptions and limitations, and must be applied reasonably. *Ib.*

PARDON.

1. **The effect of a pardon** is to obliterate the offense and make him who had been an offender as innocent, in legal contemplation, as if he had never offended, to remove all disabilities incident to the offense charged, and to restore to him all civil rights which he would have had if he had not offended, so far, at least, as it is in the power of the Government to make it so. 617.
2. **Pardon of Deserter from the Navy—Reenlistment.**—A person who, having enlisted in the Navy, deserts therefrom and is convicted of desertion by a general court-martial and thereafter receives from the President a full and unconditional pardon for such offense and restoration to civil rights, may be permitted to reenlist in the Navy notwithstanding the provisions of section 1420, Revised Statutes. *Ib.*

PASSED ASSISTANT ENGINEERS. *See* NAVY, 6, 7, 30, 31.

PASSED ASSISTANT PAYMASTERS. *See* NAVY, 32.

PASSENGERS. *See* STEAMBOAT-INSPECTION SERVICE.

PASSPORTS. *See* PANAMA, 9, 10.

PAYMENT.

WITHHOLDING PAYMENTS ON CONTRACTS. *See* CONTRACTS, 4–5.

PELAGIC SEALING. *See* SEAL FISHERIES, 1–3.

PENSION.

MAINTENANCE OF INSANE INMATES OF THE SOLDIERS' HOME. *See* SOLDIERS' HOME.

PENSION AGENTS.

FREE REGISTRATION OF OFFICIAL MAIL. *See* POSTAL SERVICE, 16, 17.

PHILIPPINE COMMISSION. *See* EXECUTIVE DEPARTMENTS, 11.

PHILIPPINE ISLANDS.

1. **Forestry Laws—Military Reservations.**—The Philippine government can not extend its forestry laws to the military reservations on those islands. 62.
2. **For Tariff Purposes, Treated as Territory Remaining, as yet, Outside of the United States.**—Under the special legislation

PHILIPPINE ISLANDS—Continued.

relating to the temporary organization of the Philippine Islands, they are treated as territory remaining, as yet, outside of the United States, in a tariff sense, for the purpose of imposing duties on articles shipped from them "into" this country analogous to those imposed on imports from a foreign country, and having such status that the term "imports" can be properly applied to merchandise brought from them into the United States. 356.

3. **Duty on Materials Brought into the United States from the Philippine Islands.**—The spirit and letter of section 30 of the tariff act of July 24, 1897 (30 Stat., 211) are broad enough to include materials brought into this country from the Philippine Islands and subjected to duty as coming from a territory which, though not a foreign country, has not been permanently incorporated into the United States, and has been temporarily treated by Congress as not within the United States for tariff purposes. *Ib.*

4. **Subig Bay Naval Reservation—Jurisdiction of the Navy Department.**—Section 12 of the act of July 1, 1902 (32 Stat., 691, 695), which reserved to the United States in the Philippine Islands "such land or other property as shall be designated by the President of the United States for military and other reservations," does not confer upon him the power to withdraw the reservation completely from the local jurisdiction and place it under the jurisdiction of the Navy Department, thereby erecting a new and independent authority for all purposes of civil government. 91.

5. **Same.**—Section 12 simply grants and reserves property; it does not confer governmental jurisdiction. *Ib.*

6. **Establishment of a Government Agricultural Bank.**—The Philippine assembly may legally and constitutionally enact suitable laws authorizing the Philippine government to open and conduct an agricultural bank, with a capital not exceeding $2,000,000, from funds now in its possession available for general appropriation. 593.

7. **Same.**—**The act of Congress of March 4, 1907** (34 Stat., 1282), authorizing the establishment of an agricultural bank by a banking company organized under Philippine laws, does not withdraw any power the Philippine government would otherwise have to establish a government agricultural bank, for the authority to charter and aid a private bank is no denial of the power to establish a government bank, which may exist independently under the Philippine scheme of governmental power. *Ib.*

See CUSTOMS LAW, 6–9.

PORTO RICO.

1. **Corporations.—The legislative assembly of Porto Rico has** authority to pass laws setting forth the conditions under which domestic corporations may be organized and foreign corporations may do business there, subject, however, to the exceptions and restrictions contained in the organic act of April 12, 1900 (31 Stat., 77, 83), and the joint resolution of May 1, 1900 (31 Stat., 715), in regard to franchises of a public or quasi-public nature, including all railroad, street railway, telegraph, and telephone franchises, privileges, or concessions. 176.
2. **Audit of Court Expenditures.—The new Porto Rican law concerning** an audit of expenditures before disbursement is not objectionable to or inconsistent with the organic act of April 12, 1900 (31 Stat., 77), merely because it provides for an effective audit of court expenses. 438.
3. **Same—United States Court in Porto Rico.**—That law does not transcend the legislative power of the insular government, and, whether wise or not, can not be treated as void or inapplicable to the United States court in Porto Rico. *Ib.*

POSTAGE STAMPS. *See* POSTAL SERVICE, 13–15.

POSTAL SERVICE.

1. **Exclusion of Seditious Publications from the Mails.**—While the question is not free from doubt, **the Postmaster-General will be justified** in excluding from the mails any issue of a periodical, otherwise entitled to the privilege of second-class mail matter, which shall contain any article constituting a seditious libel and counseling such crimes as murder, arson, riot, and treason. 555.
2. **Same.—The printing and circulation of such a paper** was clearly an offense at common law, but it constitutes no offense against the United States in the absence of a Federal statute making it one. *Ib.*
3. **Same.—The publication in question is not "indecent"** in the sense in which that word is used in section 3893, Revised Statutes, as amended by the acts of July 12, 1876 (19 Stat., 90), and September 26, 1888 (25 Stat., 496), nor is it an "article or thing intended * * * for * * * immoral use," in the sense of the particular immoral purposes which Congress intended should render such matter unmailable under the provisions of that law. *Ib.*
4. **Same.—The publication would come within the terms of the act of June 18, 1888** (25 Stat., 187), as amended by the act of September 26, 1888 (25 Stat., 496), as being "libelous," "scurrilous," "defamatory," and "threatening," **if such matter were printed on its cover or wrapper.** *Ib.*

POSTAL SERVICE—Continued.

5. **Same.—There is no statute directing the exclusion from the mails** of a publication counseling such crimes as murder, arson, riot, and treason, and making its deposit in the mails an offense against the United States; and in the absence of such a statute, it is not an offense to print and deposit in the mails a publication of such a character. *Ib.*

6. **Same.—Congress has full power under the Constitution to exclude from the mails** a publication which counsels the commission of murder, arson, riot, or treason, and to make the use, or the attempted use, of the mails for the transmission of such writings a crime against the United States. *Ib.*

7. **Weighing of the Mails.—Order 165 of the Post-Office Department,** with regard to weighing the mails on railroad routes, which provides that "*the whole number of days the mails are weighed* shall be used as a divisor for obtaining the average weight per day," may lead to arbitrary and inequitable results. 390.

8. **Same.—Order 412, which provides that** "*the whole number of days included in the weighing period* shall be used as a divisor," will give as the average weight per day during a year, the average weight during somewhat more than one-fourth of a year, without resulting in greater inaccuracy or injustice than is authorized and contemplated by the act of March 3, 1905. *Ib.*

9. **Same—Days on which Mail is to be Weighed.**—The mails are to be weighed, under the act of March 3, 1905 (33 Stat., 1088), on "working days" only, and "working days" mean days in which the carrier does work for the post-office—not "week days." *Ib.*

10. **Same.**—The act does not prohibit the Postmaster-General from weighing the mails throughout the year, nor does it require that the number of working days on which the mails are weighed shall be the same in the case of every carrier, although in none may they be less than ninety, or other than "successive" days. *Ib.*

11. **Same.—The form and method in which the information obtained from weighing the mails shall be utilized** is a matter within the discretion of the Postmaster-General, provided his action shall be directed to the ascertainment of what, in his judgment, would be an average weight per day of mails carried during a year, as nearly true as may be practicable, to be used as a basis for the yearly compensation of the carriers. *Ib.*

12. **Same.—The practice of weighing the mails on Sundays, and yet of excluding Sundays from the divisor** when the average is to be ascertained, is clearly erroneous. If Sundays are

POSTAL SERVICE—Continued.

not "working days," the law does not permit the mails to be weighed on that day; if they are "working days," their exclusion from the division renders the result of the computation false. *Ib.* 391.

13. **Postage Stamps—Portraits—Names of Individuals.**—The Postmaster-General is not required to have the names of persons whose portraits are placed upon postage stamps inscribed below such portraits. 231.

14. **Same.—Postage stamps are not "securities"** of the United States within the meaning of the proviso in the act of March 2, 1889 (25 Stat., 939, 945), which requires that the name of each person whose portrait shall be placed upon any of the plates for bonds, securities, notes, and silver certificates of the United States shall be inscribed below such portrait. *Ib.*

15. **Same.—Postage stamps are treated as supplies for the Post-Office Department** and as coming within the terms of section 3709, Revised Statutes, respecting purchases and contracts for supplies for the Executive Departments. *Ib.*

16. **Free Registration of Official Mail—Pension Agents.**—The words "official mail matter," contained in paragraph 4 of the act of July 2, 1886 (24 Stat., 122), which extends the provisions of section 3 of the act of July 5, 1884 (23 Stat., 158), relating to the free registration of official mail to pension agents, means *all* matter passing through the mails of an *official* as distinguished from a personal or private character. 101.

17. **Same.**—There is nothing to indicate an intention on the part of Congress to exclude pension agents from the provisions of section 3 of the act of 1884 (23 Stat., 158), allowing the free registration of official mail matter and the delivery of part-paid letters or packets addressed to them, which have reference to official business. *Ib.*

Opinion of June 13, 1906 (25 Op., 617), concurred in. *Ib.*

18. **Free Registration of Official Mail Matter.—The Commissioner to the Five Civilized Tribes** is not entitled to free registration of outgoing official mail matter, under section 3 of the act of July 5, 1884 (23 Stat., 158). 613.

POSTMASTER-GENERAL. *See* POSTAL SERVICE, 1, 10, 11.

POST-OFFICE BUILDING.

AT ALBUQUERQUE, N. MEX. *See* PUBLIC BUILDINGS, 3.

PRESIDENT.

1. **Appointment of Officers of the United States.**—The general rule deducible from Article II, section 2, clause 2, of the Constitution is that, in the absence of an express enactment to the contrary, the appointment of any officer of the United

PRESIDENT—Continued.

States belongs to the President by and with the advice and consent of the Senate. 627.

2. **Recess Appointment—Naval Officer.**—The President has power during the recess of the Senate, and pursuant to the act of March 4, 1907 (34 Stat., 1407), which authorized him, by and with the consent of the Senate, "to reinstate Leonard Martin Cox in the Corps of Civil Engineers of the Navy," to appoint Mr. Cox to the position indicated, provided such appointment be expressed to expire at the end of the next session of the Senate. 234.

3. **Appointment of Retired Officer of Revenue-Cutter Service to Civil Office under the Government.**—The President has authority to appoint, **without compliance with the civil-service rules**, a retired officer of the Revenue-Cutter Service whose pay amounts to $2,625 per annum, to superintend the construction of self-righting and self-balancing lifeboats and other life-saving apparatus, for such period as his services may be required, at a rate of compensation to be fixed by the Secretary of the Treasury. 460.

4. **Leave of Absence—Members of the Grand Army of the Republic.**—The President is without authority to grant an extension of leave of absence with pay to members of the Grand Army of the Republic employed in the Government service who attend the annual encampment of that order. 336.

5. **Government of the Canal Zone.**—The President may now, directly or through persons appointed and employed by him to govern the Canal Zone and build the Panama Canal, adopt needed rules and regulations for the government of that Zone, and he has not lost the power to modify any of the rules and regulations established by the Canal Commission prior to the Fifty-eighth Congress. 113.

See also PANAMA, 2, 35.

6. **Approval of Maui County (Hawaii) Bonds.**—Bonds issued under this act will constitute a legal obligation against the county of Maui whenever the President shall have signified his approval of their issue. 462.

POWER OF REMOVAL. *See* CIVIL SERVICE, 3.

DETERMINATION OF WHETHER FREIGHT CHARGES BY AMERICAN VESSELS FOR TRANSPORTATION OF COAL ARE EXCESSIVE. *See* VESSELS, 5.

CHANGE IN RELATIVE RANK. *See* NAVY, 14.

PRINTING. *See* PUBLIC PRINTING.

PROMOTIONS. *See* CIVIL SERVICE, 5.

PROTECTION OF SEALS. *See* SEAL FISHERIES.

PROVIDENCE HOSPITAL.

CONTRACT FOR SUPPORT OF PATIENTS IN. *See* CONTRACTS, 1–3.

PUBLIC BUILDINGS.

1. **Federal Building at Saratoga Springs, N. Y.—Appropriations—Contracts.**—Various acts of Congress appropriating money for the purchase of a site and the erection thereon of a Federal building at Saratoga Springs, N. Y., considered, and *held*, that the act of June 30, 1906 (34 Stat., 773), which increased the cost theretofore fixed by Congress by $35,000, and authorized the Secretary of the Treasury to enter into contracts for the completion of the building within the limit of cost, including site, authorizes that officer to acquire the site and erect the building at a total cost of $125,000. The intent of that act was to ignore the previous division between the cost of the site and the cost of the building and substitute a lump-sum limit or measure for both building and site. 20.
2. **Same.—The Secretary is therefore not limited as to the cost of the site,** but a sufficient amount of the appropriation should be reserved to properly erect the building. *Ib.*
3. **Post-Office Building at Albuquerque, N. Mex.**—In erecting the public building at Albuquerque, N. Mex., authorized by the acts of June 6, 1902, section 5 (32 Stat., 310, 320), and June 30, 1906, section 6 (34 Stat., 772, 776) the Secretary of the Treasury is limited to providing accommodations for the post-office only, and is not authorized to make provision for other governmental offices. 88.
4. **Title to Buildings and Grounds, Legation of the United States in Constantinople.**—Section 355, Revised Statutes, which requires the opinion of the Attorney-General upon the validity of the title to any land purchased by the United States for the erection of any public building thereon, does not apply to the buildings and grounds now occupied by the legation of the United States at Constantinople, Turkey, the purchase of which was provided for by the act of June 16, 1906 (34 Stat., 286, 293), since no erection of a building is contemplated by that act. 380.

PUBLIC PRINTING.

1. **Slip Laws—Cost of Printing.**—The cost of printing in slip form the 500 copies of all laws furnished the State Department under section 56 of the act of January 12, 1895 (28 Stat., 609), should not be charged against the allotment of appropriation for printing and binding for that Department. 515.
2. **Same—The Phrase "Documents or Reports" does not Embrace the Printed Laws.**—The phrase "documents or reports," as used in **the resolution of March 30, 1906** (34 Stat., 825), prescribing the appropriation or allotment out of which the cost of printing and binding of documents or reports

PUBLIC PRINTING—Continued.

emanating from the Executive Departments, bureaus, and independent offices of the Government shall be paid, is restricted to "Executive documents and reports," and does not embrace the printed laws authorized by section 56 of the act of January 12, 1895. *Ib.*

3. **Same.—Neither does the language of paragraph 7 of the act of March 1, 1907** (34 Stat., 1013), prescribing the appropriation or allotment out of which the cost of printing any document or report thereafter printed by order of Congress shall be paid, when read in connection with section 56 of the act of January 12, 1895, refer to statutes, resolutions, or treaties. *Ib.*

4. **Official Register of United States—Cost of Printing.**—The Official Register of the United States, being a public document emanating from the Census Office, all expense incurred in its actual preparation for printing, apart from the creation of the manuscript, is chargeable under the joint resolution of March 30, 1906 (34 Stat., 825), to the appropriation or allotment of appropriation for printing and binding for the Census Office; and the balance of the cost thereof, which include the cost of binding and any charge which may be incurred in the creation of the manuscript, should be charged to the Congressional allotment and the appropriate executive allotment in proportion to the number of copies delivered to Congress and to each Department. 552.

PURE-FOOD LAW.

1. **Labeling or Branding of Whisky.**—The words "**Compound**" or "**Blend**" are substantially synonymous, in ordinary speech, when applied to mixtures or liquids; but the pure-food law establishes a distinction of its own between them, based upon the character of the ingredients entering into the mixture. 216.

2. **Same.—In what may be termed a "Blend" of, or "Blended," wines** or whiskies, the two articles mixed must be capable of accurate and sufficient description by a single generic term; they must be substances known by the same name and sufficiently distinctive to afford reasonable warning to purchasers. *Ib.*

3. **Same—Blended Sherry or Blend of Sherry, Compound of Port and Sherry or Compounded Port and Sherry.**—The intent of the pure-food act of 1906 (34 Stat., 768) is that the term "Blended Sherry," for instance, or "Blend of Sherries," shall designate a mixture of two or more kinds of sherry; while the titles "Compound of port and sherry," or "Compounded port and sherry," would appropriately designate a mixture of two substances, *unlike* in the view of the law,

PURE-FOOD LAW—Continued.

namely, two distinct and different kinds of wine—"unlike" in the sense that diamonds and coal are unlike. *Ib.*

4. **Same.—Whisky is a natural spirit having certain "congeneric substances"** which give character to the distillate. *Ib.*
5. **Same—Blend of Whisky, Blended Whisky, or Blended Whiskies.**—A mixture of two or more different whiskies, as thus defined, whether their differences arise from the character of the substances from which they are distilled or from the method of distillation used, or even from their several ages and the environment in which they are kept subsequently to distillation, would be appropriately termed a "Blend of whisky," or "Blended whisky," or "Blended whiskies," any one of which would be correct, provided each article entering into the combination, standing alone, could be properly designated as "Whisky." *Ib.*
6. **Same—Compound or Compounded.**—A mixture of a spirit properly designated "Whisky" with another spirit which, standing alone, could not be properly designated as "Whisky," such as ethyl alcohol, must be labeled or branded as a "Compound" or as "Compounded." *Ib.*
7. **Same—Neutral Spirit or Ethyl Alcohol.**—For the purposes of the pure-food law, neutral spirit, or ethyl alcohol, if absolutely pure, would be not only *like*, but *identical*, whether it were derived from fruit, from cereals, from sugar cane, or from any other of the many substances which can furnish alcohol. *Ib.*
8. **Same.—A neutral spirit** is not a like substance to whisky.
9. **Same—Compound.—A mixture of whisky with neutral spirit** must be deemed a "Compound" and not a "Blend," although the spirit may be a distillate from the same substance used to furnish the whisky. *Ib.*
10. **Same—Imitation Whisky.**—If ethyl alcohol, either pure or mixed with distilled water, were given, by the addition of harmless coloring and flavoring substances, the appearance and flavor of whisky, no other name could be found for the product, in conformity with the pure-food law, than "Imitation whisky;" but it is questionable whether such mixture ought to be labeled "Whisky" at all. *Ib.*
11. **Same—Compound or Compounded Ordinarily Requires Two Substances at Least.**—When the words "Compound" or "Compounded" are used in the act, it is ordinarily necessary that two substances at least should be mentioned as entering into the combination described, as, for instance, "Sherry compounded with port" or "Port compounded with sherry" or "Compounded port and sherry." *Ib.*
12. **Same—But One Substantive can Appropriately Follow "Blend" or "Blended."**—It is not, however, universally true that

PURE-FOOD LAW—Continued.

two substantives *must* follow "Compound" or "Compounded," although it is true that only one substantive can appropriately follow "Blend" or "Blended." *Ib.*

13. **Same—Compounded Whisky.**—A combination of whisky with ethyl alcohol, supposing, of course, that there is enough whisky in it to make it a real compound and not a mere semblance of one, may be fairly called "Whisky," provided the name is accompanied by the word "Compound" or "Compounded," and a statement of the presence of another spirit is included in substance in the title; it can not, however, properly be styled "Blended whisky." *Ib.*

14. **Opinion of April 10, 1907** (*ante*, p. 216), **as to the construction of section 8 of the act of June 10, 1906** (34 Stat., 768), known as the pure-food law, reconsidered and reaffirmed. 262.

15. **Same.—The primary aim of this law** was to secure an accurate and serviceable nomenclature for articles of food, and its construction is, therefore, governed by rules in some respects different from those applicable to statutes passed wholly for different purposes, as, for example, laws imposing duties on imports. *Ib.*

16. **Same—"Straight" Whisky.**—Congress must be presumed to have legislated with reference to well-established processes in the manufacture and sale of distilled spirits, and according to such practice "straight" whisky was mixed only with two substances besides mere coloring and flavoring materials, namely, with "straight" whisky of another kind and with ethyl alcohol. *Ib.*

17. **Same—Blend.—The evident intent of the statute was** to confine the use of the word "blend" to one kind of mixture and to forbid its use for another; and since such mixture must be either composed of two different kinds of whisky, or of whisky with one other substance generally mixed with it, namely, ethyl alcohol, it is clear that Congress intended to deny the designation "blend" to a mixture of whisky and ethyl alcohol. *Ib.*

18. **Same—Ethyl Alcohol not a "Like Substance" to Whisky.**—Ethyl alcohol can not, for the purposes of the pure-food law, be considered to be a "like substance" to whisky. *Ib.*

19. **Same—Whisky.—The proper definition of the word** "whisky," for this purpose, is a question of law, and the term is to be given its ordinary significance as a word of everyday speech, and should not be understood in any commercial or scientific sense. *Ib.*

20. **The obvious purpose of the pure-food law** of June 30, 1906 (34 Stat., 768), is altogether different from that of the provisions of law relating to internal revenue. 474.

PURE-FOOD LAW—Continued.

21. **Same—Branding or Marking of Articles Transported in Interstate Commerce.**—Sections 2 and 10 of the pure-food law require that a different brand or mark shall be placed upon an article transported in interstate or foreign commerce from that required by section 3449, Revised Statutes. *Ib.* 475.

22. **Same.—The names intended by the pure-food law to be used on brands or labels** are names readily understood and conveying to the general public definite and familiar ideas as to the character or quality of the article branded, even though such names may be inaccurate in the view of a chemist, or physicist, or an expert in some particular industrial art. *Ib.*

23. **Same—Marking of Casks or Packages of Distilled Spirits.—Section 3287, Revised Statutes, requires** gaugers to mark on the casks or packages "**the particular name of such distilled spirits as known to the trade**—that is to say, high wines, alcohol, or spirits, as the case may be," and it is immaterial whether this legislative declaration was, or was not, in accordance with the fact as to trade usages at the time of its adoption, or is, or is not, in conformity with such usages at present. *Ib.*

24. **Same.—Congress considered the several kinds of spirits in the restricted sense** in which the word is used in section 3287, Revised Statutes, as liquids which were neither "high wines" nor yet "alcohol."

25. **Same.—The words "as the case may be"** in section 3287, Revised Statutes, are intended to apply to "spirits" only and not to "high wines," on the one hand, or "alcohol" on the other. *Ib.*

26. **Same.—The words "spirits, as the case may be,"** are used in conformity with the definition of the word "spirits" as given by Webster, viz: "Rum, whisky, brandy, gin, and other distilled liquors having much alcohol, in distinction from wines and malt liquors." These words mean such distilled liquor included within the definition of spirits "as may be appropriate in the particular case," that is to say, "rum" or "whisky," "brandy" or "gin," or whatever other name of a distilled spirit may be suitable. *Ib.*

27. **Same.—The brand or label, however, must contain only the general name of a spirit.** No descriptive or particular designation being required, contemplated or allowed by section 3287, Revised Statutes.

28. **Same—Neutral Spirits or Ethyl Alcohol.**—If the liquid contained in a cask or package is really so-called "neutral spirit," or in other words, for practical purposes, "ethyl alcohol," this statute requires it to be branded "alcohol"

PURE-FOOD LAW—Continued.

and does not permit it to be labeled a particular kind of potable spirits, as, for example, "whisky." *Ib.*

29. **Same.—There is no inconsistency between the provisions of section 3287, Revised Statutes,** and section 8 of the pure-food law. The former statutes are not superseded by the latter. *Ib.*

30. **Same—Section 3289, Revised Statutes, not Repealed by Pure-Food Law.**—There is nothing in the pure-food law which renders the provision of section 3289, Revised Statutes, forfeiting to the United States all distilled spirits not contained in receptacles and marked as herein prescribed, inappropriate; and that section was not repealed, either expressly or by implication, by the enactment of the pure-food law. *Ib.*

31. **Same—Section 3449, Revised Statutes, Repealed by Pure-Food Law.**—Section 3449, Revised Statutes, *in so far as it relates to the shipment, transportation, or removal* not wholly within the limits of a State, of spirituous or fermented liquors or wines, was repealed by the enactment of the pure-food law. *Ib.*

32. **Same—Question of Repeal of Section 3449, Revised Statutes, in so far as it Relates to Purely Intrastate Shipment, etc., of Spirituous Liquors, not Decided.**—The question whether section 3449, Revised Statutes, was repealed, in so far as it relates to purely intrastate shipment, transportation, or removal of spirituous or fermented liquors or wines, by the enactment of the pure-food law, not decided. *Ib.*

33. **Same—Regulations Requiring the Branding of Casks According to the Particular Name of Spirits as Known to the Trade.**—Those portions of the regulations of the Commissioner of Internal Revenue which require the gauger to mark or brand on the head of each cask containing distilled spirits "the particular name of the spirits as known to the trade," which brand or mark may be varied to suit whatever kind of spirits is contained in the package, as "high wines," "rye," "Bourbon," or "copper distilled" whisky, as the case may be, are inconsistent with the provisions of section 3287, Revised Statutes. *Ib.*

34. **Same.**—Section 3287, Revised Statutes, requires that casks or packages not containing either "high wines" or "alcohol" shall be marked with the name of a recognized distilled liquor included within the definition of potable "spirits" and nothing more. *Ib.*

35. **Same Term "High Wines" not to be Applied to Product now Marked "Whisky."**—It was not intended by the opinion of January 11, 1908 (*ante*, 474), to require the term "high

PURE-FOOD LAW—Continued.
wines" to be applied to a product now usually marked "whisky." 541.

36. **Same.—For the purposes of the revenue laws, the term "high wines" should be applied** to that which is practically the first product of distillation in which substances congeneric with alcohol have not been transformed or their properties otherwise partially eliminated so as to convert them into any form of potable spirits, and should not be applied either to any product of distillation, or to spirits which have been reduced by dilution or otherwise partially transformed so as to convert them into a form of potable spirits, although yet in crude form. *Ib.*

37. **Same.—When "high wines" have been diluted to potable proof** before being withdrawn from receiving cisterns into casks, and then constitute a form of potable spirits, although crude, then, so far at least as the revenue laws are concerned, such product more nearly resembles the particular form of potable spirits whose name it will ultimately be than it does "high wines," and it should be branded with the name of the particular potable spirits for which it is intended. *Ib.*

38. **Same.—The term "spirits, as the case may be,"** applies to those products of distillation in which, by reason of the original material used and the methods of distillation employed, certain characteristic congeneric products have been retained which differentiate them into certain forms of potable spirits, such as whisky, brandy, and rum. *Ib.*

39. **Same.—The term "alcohol"** should be applied to the distillate heretofore known as "pure, neutral, or cologne spirits." *Ib.*

40. **Same.—The by-product in the distillation of "true alcohol,"** for the purposes of the revenue laws, **may be branded as "commercial," "refuse," or "coarse" alcohol**, or any other term which will indicate definitely that it is a product intended only for purposes entirely distinct from those of a food or drug. *Ib.*, 542.

41. **Same—How Rectified Spirits Should be Branded.**—Spirits which have been rectified should be branded so as to show distinctly that the appropriate name of the potable spirits is not applied to spirits from which the congeneric substances have been practically eliminated—which would leave an alcohol—but only to those products of distillation which, without being blended or compounded with other substances, have been so treated as to partially transform or otherwise partially eliminate the original congeneric spirits and bring

PURE-FOOD LAW—Continued.
them to the condition of a particular form of potable spirits. *Ib.*

42. **Same.—The duty of rebranding packages of distilled spirits to** conform to proposed regulations should not be imposed in all cases, but should be limited to instances where the parties intending to use the spirits in Federal commerce in such manner as to render them subject to the food and drugs act, request a change in the branding. *Ib.*

43. **Same.—The owner of a cask of spirits may brand his end of the cask with any name he sees fit, subject only** to the penalties of the food and drugs act if it should enter into Federal commerce when mislabeled or misbranded under that act. *Ib.*

See also FOOD AND DRUGS ACT.

QUARTERMASTER'S SUPPLIES. *See* EIGHT-HOUR LAW, 5.

RAILROADS.

1. **Reduced Rates to Reclamation Service Employees.**—There is no provision in the act to regulate commerce (act of February 3, 1887, 24 Stat., 379), or in its various amendments, which justifies the granting of reduced rates by railroads to employees of the Reclamation Service and dependent members of their families and servants accompanying them, and laborers destined for work in that service. 47.

2. **Same.—If railroads accord these reduced rates,** they will be obliged to grant the same rates to the public in general in order to avoid a violation of section 2 of the act of June 29, 1906 (34 Stat., 584, 587). *Ib.*

3. **Baltimore and Potomac Railroad Company—Right of Way Along Anacostia River, D. C.**—The construction by the Baltimore and Potomac Railroad Company, under the acts of Congress of February 5, 1867 (14 Stat., 387), and March 18, 1869 (16 Stat., 1), of what is known as its "curved" line of road along the northern shore of the Eastern Branch of the Potomac River between south L and south M streets, in the District of Columbia, and its open and notorious operation of that line ever since its construction prior to 1870, with the tacit consent of Congress and of the Executive authorities, give to that company the same rights to maintain and operate said line which it would have had if this route had been specifically designated in the acts which authorized the construction of the road within the district. 577.

4. **Same.**—The construction by that company of what is known as its "straight" line of road along the northern shore of the Eastern Branch of the Potomac River, in the District of Columbia, under the acts of February 5, 1867, and March

RAILROADS—Continued.

18, 1869; its payment of the sum of $20,000, fixed by the Secretary of War under the act of May 14, 1888 (25 Stat., 138), as the additional expense of construction of the bridge across the Eastern Branch of the Potomac River, by reason of the change of plans to avoid interfering with the operation of its "straight" line of road; and its use of said line ever since its construction, with the knowledge of Congress and of the officers having such matters in charge, and without objection by either, vested in that company the same right to have, maintain, and use its "straight" line of road that it would have had if such right had been expressly granted. *Ib.*

5. **Same—Width of Right of Way.**—Since the Maryland charter of the railroad company allows a width of 66 feet for the right of way, and since the act of Congress of February 5, 1867, gives the same right and privilege in this respect, and since the location and construction of the "curved" and "straight" lines of road were upon this basis, the right of way of the railroad company on each of these two lines is 66 feet in width; that is, 33 feet on each side of a line midway between the inner rails of each track. *Ib.*

6. **Same—A Perpetual Easement.**—This right and interest of the railroad company is a perpetual easement for railroad purposes, leaving in the United States only the naked fee, with a possibility of reverter of the beneficial use. *Ib.*

7. **Same.—The conveyance of square 1137 and part of square 1117, in the city of Washington, District of Columbia, to Sidney Bieber,** authorized by section 21 of the act of June 30, 1906 (34 Stat., 787), should be such as to enable the purchaser to assert any right which the United States could rightfully assert and no other. It can not, however, determine what this interest is or fix the respective rights of the purchaser and the railroad company. Streets within the lands to be sold should be excepted from the conveyance. *Ib.*

8. **Same—The Easement does not Include Right to Occupy the Space Between the "Curved" and "Straight" Lines of Road.**—The easement of the railroad company to have and maintain its said "curved" and "straight" lines of road does not extend to nor include the right to occupy the space between these two rights of way with sidetracks, or otherwise. *Ib.*

9. **Same—Such Grants Construed Against Grantee.**—Unlike grants by private persons, grants of public property or rights are construed against the grantee, and pass nothing beyond what is granted expressly or by necessary implication. *Ib.*

RAILROADS—Continued.

10. **Same—The Question as to Whether the Secretary of War Should Withhold the Execution of the Conveyance One of Propriety and Expediency.**—The inquiry as to whether, in view of the fact that this water front may in future be needed by the Government in connection with any improvement of the Anacostia River, the Secretary of War should withhold the execution of the conveyance of the premises until the matter can be submitted to Congress for its further consideration, raises a question of propriety and expediency rather than of law, upon which the Attorney-General can not advise. *Ib.*

RANK. *See* NAVY, 8–14, 19, 20, 28, 29, 31, 34, 35.

RECLAMATION SERVICE. *See* CONTRACTS, 7; EIGHT-HOUR LAW, 6–12; RAILROADS, 1, 2.

REENLISTMENT. *See* NAVY, 1, 2.

REFUND. *See* INTERNAL REVENUE, 9–18.

REGISTRATION. *See* POSTAL SERVICE, 16–18.

RELATIVE RANK. *See* NAVY, 8, 11–14, 34, 35.

REMISSION OF FINES. *See* IMMIGRATION, 39.

RESERVATIONS.

1. **Subig Bay Naval Reservation—Jurisdiction of the Navy Department.**—Section 12 of the act of July 1, 1902 (32 Stat., 691, 695), which reserved to the United States in the Philippine Islands "such land or other property as shall be designated by the President of the United States for military and other reservations," does not confer upon him the power to withdraw the reservation completely from the local jurisdiction and place it under the jurisdiction of the Navy Department, thereby erecting a new and independent authority for all purposes of civil government. 91.
2. **Same.**—Section 12 simply grants and reserves property; it does not confer governmental jurisdiction. *Ib.*
3. **Forest Reserves—Employment of Geologists by the Geological Survey to Examine Mining Claims in.—The Secretary of Agriculture is not authorized to pay the expenses of geologists** employed by the Geological Survey of the Department of the Interior to examine mining claims in forest reserves out of the appropriation "General expenses, Forest Service, * * * to protect, administer, improve, and extend the national forest reserves" (act of June 30, 1906, 34 Stat., 683), or the appropriation raised by section 5 of the act of February 1, 1905 (33 Stat., 628), for the "protection, administration, improvement, and extension of the Federal forest reserves," where such employment is for the purpose of securing the cancellation of those claims and the geolo-

RESERVATIONS—Continued.

gists are to be wholly under the control of and paid by the Department of the Interior. 269.

4. **Same.—The Secretary of Agriculture has, however, the right to make any investigations necessary** or appropriate to the proper discharge of his duties "to protect, administer, improve, and extend the national forest reserves," and for these purposes the ascertainment of the geological conditions of the soil in certain parts of these reserves may be obviously relevant and the employment of the geologists above referred to clearly within his authority. *Ib.*
5. **Same.—Information thus obtained** may be placed at the disposition of the Department of the Interior and used for any purpose appropriate to the duties of that Department. *Ib.*
6. **National Forest Reserve—Charge for Use of Lands or Resources—Permits.**—The Secretary of Agriculture is authorized by the act of February 15, 1901 (31 Stat., 790), to make the granting of permits for the use of lands or resources within the national forest reserves for the purposes contemplated by that act, which include irrigation, mining, and quarrying, etc., dependent upon the payment of such charges as he may deem reasonable. 421.
7. **Same — Basis of Charge — Conservation Charge.** — Whether charges based upon the grounds specifically enumerated by the Secretary of Agriculture, to wit, the use of the ground and rights of way without regard to their special value for the particular purposes contemplated by the permit, and for "conservation," being the special value of the land for the particular purpose contemplated in excess of its value for general purposes, would or would not be reasonable, is not a question which can properly be determined by the Attorney-General. *Ib.*
8. **Same.**—*Intimated*, **that the right to use water on the forest reserves** can be secured only under the provisions of the act of June 4, 1897 (30 Stat., 35), and of other legislation specifically referring to the reserves, unless such rights existed before the particular reserve in question was created. *Ib.*

RETIRED OFFICERS. *See* NAVY, 6, 7; REVENUE-CUTTER SERVICE.

RETIREMENT.

MATES, RANK, GRADE, PAY. *See* NAVY, 15–29.

MEDICAL DIRECTOR, RANK, GRADE. *See* NAVY, 34, 35.

PASSED ASSISTANT ENGINEERS, ADVANCEMENT, RANK, GRADE. *See* NAVY, 30, 31.

REVENUE-CUTTER SERVICE.

1. **Appointment of Retired Officer of Revenue-Cutter Service to Civil Office Under the Government.**—The President has authority to appoint, without compliance with the civil-service rules, a retired officer of the Revenue-Cutter Service whose pay amounts to $2,625 per annum, to superintend the construction of self-righting and self-balancing lifeboats and other life-saving apparatus, for such period as his services may be required, at a rate of compensation to be fixed by the Secretary of the Treasury. 460.
2. **Same.—The civil-service act authorizes the making of special exceptions** from the provisions of the rules promulgated thereunder, provided the exceptions are set forth in connection with the rules and the regulations therefor stated in the annual reports of the Civil Service. *Ib.*
3. **Same.**—Such employment will not be an appointment to an office as contemplated by the act of July 31, 1894 (28 Stat., 205). *Ib.*

REVENUE OFFICERS.

DUTY TO TESTIFY. *See* INTERNAL REVENUE, 19–21.

RIGHT OF WAY. *See* RAILROADS, 3–6.

RIO GRANDE RIVER. *See* MEXICAN BOUNDARY.

SALARY.

RECESS APPOINTEE. *See* NAVY, 5.

WITHHOLDING SALARY OF A GOVERNMENT CLERK. *See* GOVERNMENT EMPLOYEES.

SALE.

OF COMMISSARY STORES. *See* ARMY, 4.

OF CONDEMNED MEDICAL SUPPLIES. *See* FOOD AND DRUGS ACT, 17–20.

SARATOGA SPRINGS, N. Y. *See* PUBLIC BUILDINGS, 1, 2.

SEAL FISHERIES.

1. **Authority of Agents of the Department of Commerce and Labor to Make Arrests.**—The agents of the Department of Commerce and Labor have power under section 174 of the act of March 3, 1899 (30 Stat., 1280), upon reasonable ground for suspecting that a violation of the laws for the protection of the Alaska seal fisheries has occurred, to search any vessel within the 3-mile limit, according to the practice of customs officers when acting under section 3059, Revised Statutes, and to seize such vessels and any property on board. They may also make arrests of persons on board such vessels reasonably believed to be guilty of a crime, and need not previously obtain a warrant. 243.
2. **Same.**—In like manner, **arrests and seizures may be made on land** when probable cause exists to believe a criminal offense has been committed. *Ib.*

SEAL FISHERIES—Continued.

3. **Same—Seizure Upon Land or Sea.**—Sealskins reasonably believed to have been acquired as the fruits of such crime may be seized either upon land or at sea within the 3-mile limit. *Ib.*
4. **Protection of Seal Rookeries on Pribilof Islands—Guard Justified in Using Force.**—The guard maintained by the United States on the Pribilof Islands for the purpose of protecting the seal rookeries thereon were justified in using all necessary means at their command in resisting the landing on those islands of armed Japanese from armed vessels for the purpose of killing seals and of appropriating their skins, and in firing upon them after they had refused to surrender and attempted to escape with the skins of the slaughtered animals. 587.
5. **Same—United States Justified in Protecting its Property.**—The United States has the undoubted property rights, as well as rights of sovereignty, in the living seals on the Pribilof Islands, and is justified, as any other property owner would be, in protecting those rights from violent invasion; and if, in attempting to violate those rights, the invader meets death or injury, there is no greater reason for complaint than there would be for a burglar, discovered in rifling the premises he had feloniously entered, to complain if he were shot by the owner. *Ib.*
6. **Same—Analogy to a Felony at Common Law.**—It is not less clearly unlawful by the law of nations for a band of foreigners, more or less fully armed, to invade the territory of a sovereign power with the deliberate purpose to violate its laws and misappropriate its property, than it is a felony by the common law for one to break by night into the dwelling of another with felonious intent. *Ib.*
7. **Same—Japanese not Entitled Under the Treaty of 1894 to Greater Immunity than our own Citizens.**—Article 1 of the Treaty of November 22, 1894 (29 Stat., 848), with Japan can not be construed as giving to the Japanese greater privileges than are conferred upon our own citizens, or as depriving either American citizens, or the Government in its corporate capacity, of the natural and universal right of self-defense for person or property, and of resisting by force a lawless force of lawbreakers merely because the latter happen to be Japanese. *Ib.*

SEAMEN. *See* VESSELS, 12, 13.

SECRETARY OF AGRICULTURE. *See* RESERVATIONS, 3, 4, 6, 7.

SECRETARY OF COMMERCE AND LABOR. *See* IMMIGRATION, 30, 39.

SECRETARY OF THE INTERIOR. *See* INDIANS, 1, 4, 28, 29, 31.

SECRETARY OF THE TREASURY. *See* INDIANS, 21, 30; INTERNAL REVENUE, 20.

SECRETARY OF WAR. *See* ARMY, 1, 3.

SEDITIOUS PUBLICATIONS. *See* POSTAL SERVICE, 1–6.

SEMINOLE INDIANS. *See* INDIANS, 24–30.

SENATORS. *See* CONGRESS, 6.

SHIPPING.

1. **Areas of Forbidden Anchorage—Authority to Establish.**—There is no general authority under existing law conferred on any Executive Department to establish areas of "forbidden anchorage" in the harbors of the United States. 258.
2. **Same—No Authority to Make Regulations Under Act of July 7, 1898.**—A criminal statute (act of July 7, 1898, 30 Stat., 717), which punishes willful or malicious injury to the harbor-defense system of the United States and intentional violation of any regulation of the War Department respecting the same, can not be taken as a grant of power to make regulations on the subject in question, however important and desirable such regulations may be. *Ib.*
3. **Same—Legislation by Congress Needed.**—The Attorney-General concurs in the view that general legislation by Congress is necessary for the protection of submarine cables connecting the several military stations in the various fortified harbors of the United States. *Ib.*
4. **Tonnage Tax—Coal for Navy—Transportation in Foreign Vessel.**—The British steamship *Ferndene*, which transported coal belonging to the United States, designed for the Navy, from Newport News to San Francisco, and had no other cargo, was not a vessel having on board goods, wares, and merchandise within the meaning of section 4219, Revised Statutes, as amended by the acts of February 27, 1877 (19 Stat., 250), and June 26, 1884 (23 Stat., 57), imposing a tax of 50 cents per ton "upon every vessel not of the United States which shall be entered in one district from another district having on board goods, wares, and merchandise to be delivered in another district." 426.
5. **Same.—If the Ferndene carried any other goods, wares, or** merchandise, not the property of the Government, that portion of her cargo would be liable to forfeiture under the act of February 17, 1898 (30 Stat., 248). *Ib.*

LIABILITY OF STEAMSHIP COMPANIES FOR TRANSPORTATION AND EXPENSES INCIDENT TO DEPORTATION OF ALIENS, INCLUDING ATTENDANTS. *See* IMMIGRATION, 30–38.

SLIP LAWS. *See* PUBLIC PRINTING, 1–3.

SMITHSONIAN INSTITUTION. *See* EXECUTIVE DEPARTMENTS, 3.

SOLDIERS' HOME.

Insane Inmate—Maintenance in Government Hospital for the Insane—Pension.—Where an inmate of the National Soldiers' Home becomes insane and is transferred to the Government Hospital for the Insane, the pension received by such inmate is to be devoted to his maintenance and treatment at the hospital; and the excess cost of such maintenance and treatment over the amount of his pension is to be paid from funds appropriated for such hospital. 512.

APPOINTMENT OF A SENATOR OR CONGRESSMAN AS A MEMBER OF THE BOARD OF MANAGERS. *See* CONGRESS, 6–9.

SOVEREIGNTY. *See* PANAMA, 11, 12.

STAMP TAXES. *See* INTERNAL REVENUE, 17.

STATE IMMIGRATION. *See* IMMIGRATION, 2–29.

STATUTORY CONSTRUCTION.

1. **Reasonable Construction.**—Laws should be given a reasonable construction and application to further the object of the lawmaker. 12.
2. **Burdensome Requirements which may be Performed in Several Ways.**—When the law imposes a burdensome requirement upon an individual to do some act which can be reasonably well done in several ways, and does not expressly or impliedly require it to be done in any particular way, it can be satisfied by doing the act in the way least expensive or troublesome to the individual. 381.
3. **Grave Public Injury or Inconvenience.**—There is a presumption against a construction of a statute which would cause grave public injury or even inconvenience (187 U. S., 118, 124). 449.
4. **Great Inconvenience, Inequality, or Injustice.**—It is a familiar rule of construction that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided, if another and more reasonable interpretation is present in the statute. 605.
5. **Statute which Interferes with the Carrying out of a Subsequent Statute.—Where the meaning of a statute is fairly plain,** the fact that it interferes with the carrying out of the terms of a subsequent statute in a manner probably not contemplated by Congress can not be considered. In such cases the legislative intent, even if it were susceptible of legal ascertainment, is of little effect except as it is expressed in legislative enactments, and when so expressed the legal meaning of what is said must be taken to express the legislative intent, whenever that intent is material. 537.

STATUTORY CONSTRUCTION—Continued.

6. **In the absence of an express repeal of an earlier statute** by a later one covering the same subject, effect should be given to both unless there is a positive repugnance between them, in whole or in part, in which case the earlier statute is repealed by implication to the extent of such repugnancy, or unless the provisions of the latter statute cover the whole subject of the earlier law and are plainly intended as a substitute therefor, in which case there is likewise a repeal of the earlier statute by implication. 166.
7. **The language of a later statute will be harmonized, if possible,** with that of an earlier, and will be held to have modified the earlier only in so far as they are plainly in conflict; but if there is an evident conflict between the terms of the two enactments those of the latter must prevail. 476.
8. **Similar Term used in an Appropriation Act as Employed in the Civil-Service Act.**—Where Congress in an appropriation act makes use of the very term employed in the civil-service act in describing appointments to be made in accordance with its provisions, it is manifest that there was no intention to waive the requirements of the civil-service law. 502.
9. **Construction Placed upon an Act by the Department Charged with its Execution.—When the meaning of a statute is doubtful,** great weight should be given to the construction placed upon it by the Department charged with its execution, and where such construction has been uniform and long continued it should not be disregarded without the most cogent reasons, and still greater weight should be given where the statute has been subsequently reenacted by Congress. 311.
10. **Departmental Construction.**—Where the meaning of a statute is doubtful or ambiguous, the practical construction placed upon it by the Department of the Government charged with its administration, if contemporaneous, uniform, and long continued, although not deemed controlling on the courts, will ordinarily be followed. 390.
11. **Same.**—Departmental construction is, however, without weight where the statute is clear and explicit and free from ambiguity or doubt. *Ib.*
12. **Argument in favor of a particular construction** of a statute because other statutory provisions have that meaning, though permissible, is not of great force. 304.
13. **A prohibition in a statute of general application does not extend to, or affect, the sovereign,** unless its language requires that such a meaning shall be given to it. The sovereign authority of the country is not bound by the words of a statute unless named therein. (20 Wall., 251.) 415.

STATUTORY CONSTRUCTION—Continued.

14. **Debates in Congress—Scope of a Statute.**—Although debates in Congress are not appropriate sources of information from which to discover the meaning of an act of Congress, yet the Supreme Court has, on occasion, examined the reports of committees of either House with a view to determining the scope of statutes passed on the strength of such reports. (*United States* v. *Binns*, 194 U. S., 486, 495.) 254.

FOR STATUTES INTERPRETED *see* TABLES OF ACTS OF CONGRESS, AND SECTIONS OF THE REVISED STATUTES, CITED OR REFERRED TO, *see* pp. V–XII; *also* HAWAII, 1.

STEAMSHIP COMPANIES. *See* IMMIGRATION, 31, 32, 36, 37.

STEAMBOAT-INSPECTION SERVICE.

1. **Number of Passengers Allowed on Steamboats.—The duty of enforcing the law** limiting the number of passengers a steamer may carry rests equally on officers of the customs and on steamboat inspectors under section 4496, Revised Statutes; and the Secretary of Commerce and Labor, the Steamboat-Inspection Service having been transferred from the Treasury Department to his Department, has the authority to appoint additional inspectors at certain ports and to assign them to the duty in question, but he is not authorized to assume entire control of the enforcement of this provision of the law. 272.

2. **Same.—The "inspectors aforesaid,"** referred to in section 30 of the act of February 28, 1871 (16 Stat., 440), from which section 4496, Revised Statutes, is taken, **were local inspectors of steam vessels**, and therefore the words "all inspectors," in section 4496, refer to such inspectors, being the only ones included in Title LII of the Revised Statutes, and not to inspectors of customs. *Ib.*

STRAIGHT WHISKY. *See* PURE-FOOD LAW, 16.

SUBIG BAY NAVAL RESERVATION. *See* RESERVATIONS, 1, 2.

SUBMARINE AND SUBSURFACE BOATS. *See* NAVY, 36–40.

SUBSTITUTE BONDS. *See* BONDS, 1, 2.

SUNDAYS. *See* POSTAL SERVICE, 12.

SURETY. *See* BONDS, 1.

SURETY COMPANIES. *See* BONDS, 4, 5.

SURGEON-GENERAL OF THE ARMY. *See* CONTRACTS, 1.

SURVEYORS OF CUSTOMS. *See* DISBURSEMENT OF PUBLIC MONEYS.

TEA-INSPECTION ACT. *See* FOOD AND DRUGS ACT, 1–5.

TESTIMONY. *See* INTERNAL REVENUE, 19–21.

TITLE. *See* NAVAL HOSPITAL AT YOKOHAMA.

TONNAGE TAX. *See* SHIPPING, 4, 5.

TRANSFER. *See* EXECUTIVE DEPARTMENTS, 9–13.

TRANSPORTATION. *See* VESSELS, 1–9.

TREASURY DEPARTMENT.

1. **Comptroller of the Treasury—Payments out of the Treasury.**—The relative jurisdictions of the Comptroller of the Treasury and of the Attorney-General over questions involving the payment of money out of the Treasury, reviewed, and opinion of December 22, 1904 (25 Op., 301), approved and followed. 81.
2. **Same.—Generally speaking, the decision of the Comptroller of the Treasury is conclusive** in cases involving the application of an appropriation and the expenditure of public moneys, and governs the auditing officers and himself in passing accounts under section 8 of the act of July 31, 1894 (28 Stat., 208). 609.
3. **When, however, the disbursement is a question of general and great importance,** and especially when the Comptroller, in advance of a decision by himself, requests that the matter be referred to the Attorney-General for opinion and states that he will be guided by such opinion, the question may properly be answered by the Attorney-General. *Ib.*

   Rules stated in former opinions adhered to. *Ib.*
4. **Second Comptroller of the Currency—Office can not be Filled by the Secretary of the Treasury.**—The Secretary of the Treasury has no power, under section 169, Revised Statutes, to appoint a person to fill the office of Second Deputy Comptroller of the Currency created by the act of May 22, 1908 (35 Stat., 203), no such authority being expressly granted in the act creating that office. 627.
5. **Same—Power in Absence of Comptroller and First Deputy Comptroller.**—The Second Deputy Comptroller will have power to perform all the duties of the Comptroller and First Deputy Comptroller of the Currency in the absence or disability of those officers. *Ib.*
6. **Same—Bond may be Required.**—The Secretary of the Treasury, upon the request of the Comptroller of the Currency and with the approval of the President, may require the Second Deputy Comptroller to execute a voluntary bond in such penalty as may to him seem adequate to protect the public interests. *Ib.*

COMPROMISE. *See* OLEOMARGARINE LAW.

DEPOSIT OF EASTERN CHEROKEE FUND. *See* INDIANS, 32.

STATEMENT TO SECRETARY OF THE TREASURY OF SALES OF COMMISSARY STORES. *See* ARMY, 4.

UNITED STATES. *See* MEXICAN BOUNDARY, 4.

PROTECTION OF SEALS. *See* SEAL FISHERIES, 4, 5.

RIGHT TO DISPOSE OF WYANDOTTE INDIAN CEMETERY AT KANSAS CITY, KANS. *See* INDIANS, 34.

DESTRUCTION OF OYSTER BEDS IN NAVIGABLE WATERS. *See* NAVIGABLE WATERS, 1.

VESSELS.

1. **Transportation of Coal for Navy in Foreign Vessels.**—Coal for the use of the Navy may, under existing law, be transported by sea from ports on the Atlantic to ports on the Pacific coast of the United States in vessels of foreign registry where sufficient **American vessels** for that purpose can not be had, or where the charges made by such vessels are excessive and unreasonable. 415.
2. **Same.—The forfeiture of such coal** would merely vest the title thereto in the United States, and the Government would thereby merely acquire title to something which it already owned. *Ib.*
3. **Same.—The act of April 28, 1904** (33 Stat., 518), which provides that the War and Navy Departments shall in general employ vessels of the United States for the transportation of coal and other supplies purchased for the use of the Army or Navy, provided the rates charged are not excessive or unreasonable, **contemplates** the possibility that it may be impossible to comply with its terms without exposing the Government to exorbitant and unreasonable expense. *Ib.*
4. **Same.**—This statute does not expressly cover **the contingency that there might be no American vessels obtainable at any cost,** but in such a case the rule of a reasonable construction of all legislative acts applies, and there would be the same right to employ other means of transportation as is expressly granted where American vessels can be procured, but only at excessive cost to the Government. *Ib.*
5. **Same—When Freight Rates Charged by American Vessels are Excessive, Open Competition Lawful.—Whenever the President shall determine,** as provided by the act of 1904, that the rates of freight charged by American vessels for the transportation of coal or other supplies purchased for the use of the Navy are excessive or unreasonable, the Navy Department is authorized to procure such transportation through free competition, open to both American and foreign shipowners. *Ib.*
6. **Same.—The preference granted by this act** is to be construed as a privilege to be claimed by American shipowners, which provision is inoperative if not claimed under the conditions prescribed by the law itself. *Ib.*

VESSELS—Continued.

7. **Same.—Section 4347, Revised Statutes, and the act of February 17, 1898** (30 Stat., 248), which prohibit the transportation of merchandise from one domestic port to another in vessels owned by foreigners, "under penalty or forfeiture thereof," do not apply to property owned by the Government. *Ib.*
8. **Coal for Navy—Transportation in Foreign Vessels—Tonnage Tax.**—The British steamship *Ferndene*, which transported coal belonging to the United States, designed for the Navy, from Newport News to San Francisco, and had no other cargo, was not a vessel having on board goods, wares, and merchandise within the meaning of section 4219, Revised Statutes, as amended by the acts of February 27, 1877 (19 Stat., 250), and June 26, 1884 (23 Stat., 57), imposing a tax of 50 cents per ton "upon every vessel not of the United States which shall be entered in one district from another district having on board goods, wares, and merchandise to be delivered in another district." 427.
9. **Same.—If the "Ferndene" carried any other goods, wares, or merchandise** not the property of the Government, that portion of her cargo would be liable to forfeiture under the act of February 17, 1898 (30 Stat., 248). *Ib.*
10. **Drawback—Coal Used on American Vessels.**—Continuous customs custody is not essential to the allowance of drawback, under paragraph 415 of the tariff act of July 24, 1897 (30 Stat., 190), on coal imported into the United States and afterwards used for fuel on board of vessels registered under the laws of the United States, propelled by steam, and engaged in trade with foreign countries. 531.
11. **Same.—Sections 2977, 2978, and 3025, Revised Statutes**, relate exclusively to drawback or return of duties on exported merchandise, and **have no application** to the allowance of drawback on fuel coal under paragraph 415 of the tariff act of 1897. *Ib.*
12. **Transportation Furnished Destitute Crew of an American Fishing Vessel.**—The crew of an American fishing vessel are seamen within the meaning of section 4577, Revised Statutes, and the cost of transportation to the United States of the destitute crew of such a vessel, furnished by a United States consul, **is a proper charge against the appropriation** for the "relief and protection of American seamen in foreign countries." 631.
13. **Same—Right of Recovery Therefor.—Where the destitution of the crew has resulted from the vessel owner's fault or misconduct**, and that fact has been established, there would seem to be a right of recovery in the United States upon

VESSELS—Continued.

general principles of law for the cost of subsistence and transportation furnished under the statute. *Ib.*

14. **Same.—The question whether a suit by the Government to enforce recovery** from the vessel owners of the expense thus expended **would be successful, is speculative** and hypothetical and beyond the power and functions of the Attorney-General under the statutes to answer. The question of the actual liability of the vessel owners is judicial in its nature and must be determined by the courts. *Ib.*

WAR DEPARTMENT.

The Bureau of Insular Affairs is an integral part of the War Department. 209.

QUARTERMASTER'S SUPPLIES. *See* EIGHT-HOUR LAW, 5.

WATCHMEN. *See* EIGHT-HOUR LAW, 17–19.

WEIGHING OF THE MAILS. *See* POSTAL SERVICE, 7–12.

WHISKY. *See* PURE-FOOD LAW.

WITHHOLDING SALARY. *See* GOVERNMENT EMPLOYEES.

WORDS AND PHRASES.

1. **"Alcohol."**—The term "alcohol" should be applied to the distillate heretofore known as "pure, neutral, or cologne spirits." 541.
2. **"Any Boat that does not in such Test Prove to be."**—The words "any boat that does not in such test prove to be" equal to the best boat now owned by the United States, in the act of March 2, 1907 (34 Stat., 1204), must be understood as meaning "any boat that is not shown by the result of such tests likely to be." 321.
3. **"Blend," "Blended."**—In what may be term a "blend" of, or "blended," wines or whiskies, the two articles mixed must be capable of accurate and sufficient description by a single generic term; they must be substances known by the same name and sufficiently distinctive to afford reasonable warning to purchasers. 216.
4. **"Blend."**—The evident intent of the statute was to confine the use of the word "blend" to one kind of mixture and to forbid its use for another; and since such mixture must be either composed of two different kinds of whisky, or of whisky with one other substance generally mixed with it, namely, ethyl alcohol, it is clear that Congress intended to deny the designation "blend" to a mixture of whisky and ethyl alcohol. 262.
5. **"Blend."** *See also* "COMPOUND."
6. **"Blended Whisky."**—A combination of whisky with ethyl alcohol, supposing, of course, that there is enough whisky in

WORDS AND PHRASES—Continued.

it to make it a real compound and not a mere semblance of one, may be fairly called "whisky," provided the name is accompanied by the word "compound" or "compounded," and a statement of the presence of another spirit is included in substance in the title; it can not, however, properly be styled "blended whisky." 217.

7. "**Blend of Whisky**," "**Blended Whisky**," or "**Blended Whiskies.**"—A mixture of two or more different whiskies, as thus defined, whether their differences arise from the character of the substances from which they are distilled or from the method of distillation used, or even from their several ages and the environment in which they are kept subsequently to distillation, would be appropriately termed a "blend of whisky," or "blended whisky," or "blended whiskies," any one of which would be correct, provided each article entering into the combination, standing alone, could be properly designated as "whisky." 216.

8. "**Commencement in Good Faith.**"—By the expression "commencement in good faith," as found in the act of March 3, 1905 (33 Stat., 1266), providing for the construction of the Diamond Shoal Light-House, the beginning of a continuous operation of construction was intended, rather than the making of a first move followed by an immediate cessation of work and with no apparent readiness to proceed further. 337.

9. "**Compound.**"—The words "compound" or "blend" are substantially synonymous, in ordinary speech, when applied to mixtures or liquids; but the pure-food law establishes a distinction of its own between them, based upon the character of the ingredients entering into the mixture. 216.

10. "**Compound.**"—A mixture of whisky with neutral spirit must be deemed a "compound" and not a "blend," although the spirit may be a distillate from the same substance used to furnish the whisky. 216.

11. "**Compound**" or "**Compounded.**"—A mixture of a spirit properly designated "whisky" with another spirit which, standing alone, could not be properly designated as "whisky," such as ethyl alcohol, must be labeled or branded as a "compound" or as "compounded." 216.

12. "**Compound**" or "**Compounded.**"—When the words "compound" or "compounded" are used in the pure-food act, it is ordinarily necessary that two substances at least should be mentioned as entering into the combination described, as, for instance, "sherry compounded with port" or "port compounded with sherry" or "compounded port and sherry." 217.

WORDS AND PHRASES—Continued.

13. "**Construction.**"—The term "construction," as used in the act of March 3, 1905 (33 Stat., 1266), providing for the construction of the Diamond Shoal Light-House, means an actual putting together of the parts of the light-house in their proper place and order, with regard to each other, if not necessarily upon the site to be occupied. 337.
14. "**Departments.**"—The terms "Departments," or "*Executive Departments*," as used in acts of Congress and in the Revised Statutes, invariably apply to one or more of the several Executive Departments mentioned in section 158, Revised Statutes, or included within the terms of that section by subsequent enactments, unless a different meaning is clearly indicated by the context. 209.
15. "**Department.**"—The term "Department," as used in laws relating to the civil service, is distinguished from "Office," "bureau," and "branch;" and subordinates of the several Executive Departments are distinguished from employees of the last-mentioned governmental agencies. *Ib.*
16. "**Documents or Reports.**"—The phrase "documents or reports," as used in the resolution of March 30, 1906 (34 Stat., 825), prescribing the appropriation or allotment out of which the cost of printing and binding of documents or reports emanating from the Executive Departments, bureaus, and independent offices of the Government shall be paid, is restricted to "Executive documents and reports," and does not embrace the printed laws authorized by section 56 of the act of January 12, 1895. 514.
17. "**Equal.**"—The word "equal," in the provision of the act of March 2, 1907 (34 Stat., 1204), for the construction or purchase of subsurface or submarine boats, must be understood as meaning "at least equal" or "not inferior;" and the words "in value for naval purposes," or equivalent language, must be read into the passage after the word "equal." 321.
18. "**Ethyl Alcohol.**"—If ethyl alcohol, either pure or mixed with distilled water, were given, by the addition of harmless coloring and flavoring substances, the appearance and flavor of whisky, no other name could be found for the product, in conformity with the pure-food law, than "Imitation whisky;" but it is questionable whether such mixture ought to be labeled "Whisky" at all. 216.
19. **Ethyl alcohol** can not, for the purposes of the pure-food law, be considered to be a "like substance" to whisky. 262.
20. "**Executive Departments.**" *See also* "DEPARTMENTS."

WORDS AND PHRASES—Continued.

21. "**Expenses Incident to such Service.**"—The "expense incident to such service," referred to in section 21 of the act of February 20, 1907 (34 Stat., 904), providing for the payment of the expenses of attendants required to accompany infirm aliens who are deported from the United States, is all the expense directly and incidentally caused by the fact that such service has been required. This includes the return trip of the attendant and also his compensation. The expression "all the expenses incident to the employment and detail of attendants," comes under the same head. 381.
22. "**Export.**" *See* "IMPORT."
23. "**Field Force.**"—The "field force" of an Executive Department—that is, its classified employees under its immediate control, as inspectors, examiners, and agents, though employed usually or invariably away from the seat of government—are governed by the above-mentioned statutory provision with regard to transfers. 209.
24. "**Import.**"—Although most of the definitions of the words "import" and "export" refer to the taking of goods from one country to another, they being ordinarily the only cases in which import or export duties are imposed, these words may be also used in reference to the taking of goods from one part of a country to another or from one State to another. 355.
25. "**Imported.**"—The word "imported," as used in section 30 of the tariff act of July 24, 1897 (30 Stat., 211), does not necessarily imply that the materials in which drawback is to be allowed must have come from a foreign country in a technical sense. 356.
26. "**Inspectors Aforesaid.**"—The "inspectors aforesaid," referred to in section 30 of the act of February 28, 1871 (16 Stat., 440), from which section 4496, Revised Statutes, is taken, were local inspectors of steam vessels, and therefore the words "all inspectors," in section 4496, refer to such inspectors, being the only ones included in Title LII of the Revised Statutes, and not to inspectors of customs. 273.
27. "**Lineal Rank being Considered.**"—The expression "lineal rank being considered," in section 1466 Revised Statutes, means simply that it is not necessary to specify and fix relative staff rank, since staff officers in both services possess assimilated lineal rank. 16.
28. "**May Happen.**"—The words "may happen," in Article II, section 2, clause 3, of the Constitution, mean "may happen to exist." Therefore the President has power whenever and however a vacancy first occurred, whether by death, resignation, etc., or by the creation of a new office by act of Con-

WORDS AND PHRASES—Continued.

gress, which is an "original vacancy," to fill the place during the recess of the Senate by a temporary appointment under a commission which shall expire at the end of the next session of the Senate. 234.

29. "**National Guard.**"—The terms "National Guard" or "Organized Militia," as used in the act of March 2, 1907 (34 Stat., 1175), embrace the whole of the militia organized under the laws of the States or Territories, whether intended for land or naval service, and are not restricted to such portions thereof as are intended for land service only. 303.

30. "**Neutral Spirit.**"—A neutral spirit is not a like substance to whisky. 216.

31. "**Neutral Spirit.**"—For the purposes of the pure-food law, neutral spirit, or ethyl alcohol, if absolutely pure, would be not only *like*, but *identical*, whether it were derived from fruit, from cereals, from sugar cane, or from any other of the many substances which can furnish alcohol. 216.

32. "**Official Mail Matter.**"—The words "official mail matter," contained in paragraph 4 of the act of July 2, 1886 (24 Stat., 122), which extends the provisions of section 3 of the act of July 5, 1884 (23 Stat., 158), relating to the free registration of official mail to pension agents, means *all* matter passing through the mails of an *official* as distinguished from a personal or private character. 101.

33. "**Organized Militia.**" *See* "NATIONAL GUARD."

34. "**Person.**"—The word "person" in section 4 of the act of March 3, 1903 (32 Stat., 1214), providing that it shall be unlawful for "any person" to prepay the passage of an alien induced to migrate by any offer, solicitation, promise, or agreement to perform labor, does not include a State, but it does include an officer of a State professing to act under its authority. 199.

35. "**Promise of Employment.**"—The words "promise of employment," in section 6 of the act of March 3, 1903 (32 Stat., 1215), are used in a broad sense, meaning not merely an offer of employment which, by acceptance, would create a contract enforceable against some definite person or persons, but any form of words which might be reasonably understood as holding out to a possible immigrant the prospect of assured employment. 200.

36. "**Public Works.**"—*Suggested*, that the words "public works" can not be restricted to the conception of fixed things, such as land and structures thereon. The expression is used in river and harbor acts which provide for repairs to break-

WORDS AND PHRASES—Continued.

waters and for improving rivers according to projects submitted, including, probably, dredging and deepening of channels, the interest of the United States therein being akin in permanence and completeness to title to real estate and ownership of fixed structures. 30.

37. "**Public Work**"—"**Public Works.**"—*Suggested, also,* that there is a difference between "public work" and "public works," the former being the broader term and including the progress or activity, and the latter the product or completed thing. *Ib.*

38. "**Securities.**"—Postage stamps are not "securities" of the United States within the meaning of the proviso in the act of March 2, 1889 (25 Stat., 939, 945), which requires that the name of each person whose portrait shall be placed upon any of the plates for bonds, securities, notes, and silver certificates of the United States shall be inscribed below such portrait. 231.

39. "**Sovereign Rights.**"—The words "sovereign rights," "within the Zone," in Article III of the treaty of November 18, 1903, with Panama (33 Stat., 2234), mean, among other things, the right to the allegiance of the Zone's people. 376.

40. "**Spirits.**" *See* "SPIRITS, AS THE CASE MAY BE."

41. "**Spirits, as the Case may be.**"—The words "spirits, as the case may be," used in section 3287, Revised Statutes, are used in conformity with the definition of the word "**spirits**" as given by Webster, viz: "Rum, whisky, brandy, gin, and other distilled liquors having much alcohol, in distinction from wines and malt liquors." These words mean such distilled liquor included within the definition of spirits "as may be appropriate in the particular case," that is to say, "rum" or "whisky," "brandy" or "gin," or whatever other name of a distilled spirit may be suitable. 475.

42. "**Spirits, as the Case may be.**"—The term "spirits, as the case may be," used in section 3287, Revised Statutes, applies to those products of distillation in which, by reason of the original material used and the methods of distillation employed, certain characteristic congeneric products have been retained which differentiate them into certain forms of potable spirits, such as whisky, brandy, and rum. 541.

43. "**State.**"—The word "State," as used in section 355, Revised Statutes, regarding the acquisition of land for the erection thereon of any armory, arsenal, etc., or any other public building of any kind whatsoever, signifies a State of the Union. 12.

WORDS AND PHRASES—Continued.

44. "**Until he has Accounted for and Paid into the Treasury,**" etc.—The expression "until he has accounted for and paid into the Treasury all sums for which he may be liable," found in section 1766, does not refer to mere indebtedness, but clearly applies to one who has received Government moneys to be disbursed or covered into the Treasury. 77.

45. **Whisky** is a natural spirit having certain "congeneric substances" which give character to the distillate. 216.

46. "**Whisky.**"—The proper definition of the word "whisky," for the purpose of the pure-food act, is a question of law, and the term is to be given its ordinary significance as a word of everyday speech, and should not be understood in any commercial or scientific sense. 263.

47. "**Within the Zone.**" *See* SOVEREIGN RIGHTS.

WYANDOTTE INDIAN CEMETERY, KANSAS CITY, KANS. *See* INDIANS, 34, 35.

YOKOHAMA. *See* NAVAL HOSPITAL AT YOKOHAMA.

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